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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 336

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARST PUBLICATIONS, INCORPORATED

No. 337

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

STOCKHOLDERS PUBLISHING COMPANY, INC.

No. 338

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARST PUBLICATIONS, INCORPORATED

No. 339

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE TIMES-MIRROR COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions in the court below (R. 1843–1852) are reported at 136 F. (2d) 608. The findings of fact, conclusions of law, and orders of the National Labor Relations Board (R. 331–351, 454–479) are reported at 39 N. L. R. B. 1245, 1256. The decisions of the Board in prior representation proceedings which form part of the record in these cases (R. 76–146, 187–197, 237–240) are reported at 28 N. L. R. B. 1006, 33 N. L. R. B. 941, and 36 N. L. R. B. 285.

JURISDICTION

The decrees of the circuit court of appeals were entered June 10, 1943 (R. 1852–1854). The petition for writs of certiorari was filed September 9, 1943, and was granted October 25, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's ultimate finding that certain individuals are employees within the meaning of the Act is to be accepted by the courts when not unreasonable or is to be subjected to *de novo* judicial review.

2. Whether the Board properly found that persons selling newspapers who are subject to the supervision and control of the publishing

company are employees within the meaning of Section 2 (3) of the Act.

3. Whether the context of the Act furnishes the basis for a definition of employment broader in scope than the common law definition of a servant.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 84–89.

STATEMENT

In proceedings instituted by four separate petitions for investigation and certification of representatives under Section 9 (c) of the Act, filed by the Los Angeles Newsboys Local Industrial Union, No. 75, affiliated with the Congress of Industrial Organizations, herein called the Union, the Board issued a decision and direction of elections. The Board found that respondents were engaged in commerce within the meaning of the Act, that their newsboys were employees under Section 2 (3), and that the regular full-time newsboys vending each separate newspaper constituted a separate appropriate bargaining unit. (R. 77–121; 28 N. L. R. B. 1006.) The Union was selected by a majority of the eligible employees in each election and as a result was certified by the Board as the representative of each of respondents' newsboys within the ap-

propriate unit (R. 187–197, 237–240; 33 N. L. R. B. 941, 36 N. L. R. B. 285).

Thereafter, in proceedings under Section 10 (c) of the Act, the Board, on March 30, 1942, issued decisions finding that each of the respondents, subsequent to the certification of the Union, had refused to bargain collectively with it, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 331–350, 455–479; 39 N. L. R. B. 1245, 1256). The Board ordered each respondent to cease and desist from refusing to bargain with the Union or engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees; upon request to bargain collectively with the Union; and to post appropriate notices (R. 347–350, 475–479; 39 N. L. R. B. 1245, 1256).

The evidence in support of the Board's finding that the newsboys are employees of the respective respondents (R. 88–111, 342–344, 466–473), may be summarized as follows:

Respondents publish four newspapers;[1] the persons within the appropriate bargaining units were stated by the Board to be as follows:

News and Herald: All full-time newsboys and checkmen who are engaged to sell the News or the

[1] Hearst Publications, Incorporated, publishes the Los Angeles Evening Herald and Express, an evening paper published daily except Sunday, and the Los Angeles Examiner, a morning paper published daily, including Sunday (R. 49, 69). The department of Hearst Publications, Incorporated, which publishes the Los Angeles Herald and

Herald, as the case may be, within Los Angeles, California, excluding bootjackers,[2] temporary, casual, and part-time newsboys (R. 115). There were 349 such persons within the News unit and 209 within the Herald unit at the time of the election (R. 189–190).

Times and Examiner: All newsboys engaged in the street sale of the Times or the Examiner, as the case may be, at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles (and in the case of the Times, Glendale), California, except temporary newsboys (R. 115–116). There were 457 such persons within the Times unit and 453 within the Examiner unit at the time of the election (R. 191, 238).

The persons in the appropriate bargaining units are not, as the name implies, *boys* but are mature or elderly men, often with families to support, who depend upon their earnings from the distribution of respondents' newspapers on the streets as their source of livelihood (*Herald*, R. 713, 859–860, 878, 945; *Examiner*, R. 1380, 1419,

Express, is herein called the Herald; that which publishes the Los Angeles Examiner is herein called the Examiner. Respondent Stockholders Publishing Co., Inc., publishes the News, a paper published daily except Sunday (R. 61), and respondent The Times-Mirror Company, publishes daily, including Sunday, the Los Angeles Times, a morning paper, which is herein called the Times (R. 64–65, 1169).

[2] A bootjacker is a newsboy who sells to the general public at places other than established corners (R. 112).

1438, 1498–1499, 1530, 1619; *Times,* R. 1168, 1194, 1284, 1309–1310, 1632; *News,* R. 558–559, 859–860.[4] Many of them have long service records (*Herald,* R. 599, 713, 727, 735, 746, 799–800, 804, 875, 884, 896, 930, 939, 945, 981, 1117; *Examiner,* R. 1397, 1404, 1425; *Times,* R. 1284, 1315; *News,* R. 749, 890, 981, 1117–1118); they form a stable group, subject to little fluctuation (*Herald,* R. 599, 863–864; *Examiner,* R. 1381–1382, 1439–1440, 1521; *Times,* R. 1284, 1286).[5] They differ in these respects from schoolboys who serve a home delivery route and are known as carriers,[6] or who act as part-time street salesmen (R. 860–861, 865, 1128). The latter are expressly excluded from the unit found by the Board to be appropriate (R. 114–116) and the Board has not passed upon the applicability of the Act to such persons.

Included by the Board within the unit appropriate for collective bargaining with the News and the Herald are checkmen who differ from other newsboys in that they are assigned a "main

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[4] Throughout this brief, reference will be made to the respondents collectively except where an individual factual variation requires a reference to the specific respondent. The record references following any statement referring to respondents collectively will indicate what evidence supports the statement with respect to each respondent in the following manner: (*Examiner,* R. —; *Herald,* R. —; *Times,* R. —; *News,* R.—).

[5] District Manager Woods of the Herald testified that he had worked with virtually the same crew for 15 years (R. 599).

[6] Street salesmen are called "hustlers" (R. 504–521, 613–629, 1281).

spot"[6] where they receive, in addition to the papers they themselves hawk, papers which they in turn distribute to the "off-spot" newsboys, keeping a written record of the number so delivered to others, receiving the returned papers and accounting to respondents' district managers (*Herald,* R. 588–589, 708–709, 784–785, 791, 821–822; *News,* R. 749–750, 790–792, 805, 808, 833–834, 899, 1089–1093, 1118, 1124, 1129).[7] Each Herald checkman is responsible for a group of from 1 to 17 "off-spot" boys, who are designated by the publisher, and to whom he supplies papers in accordance with instructions (R. 605, 611, 616–629). In the business area such checkmen exercise discretion as to the number of papers to be allotted each "off-spot" boy (R. 607).

Though designated as "wholesalers" (*Herald,* R. 605; *News,* R. 1089) the checkmen do not sell the papers to the "off-spot" boys and there is no differential between the price which they pay for

[6] The corner which does the best business is known as the "main spot" and the other corners as the "off spots" (R. 1437, 1381).

[7] Herald District Manager Plotkin thus described the checkman's duties (R. 694–695): "Well, when I put a man to work on the corner, I tell him what the duties are, such as taking charge of the boys, and supplying them with papers, and seeing that they are working, and I tell him the first edition comes out around a quarter of 10:00 or 10:00 o'clock, and so he knows that he should be out there at that time. * * * The instructions are that he supply the boys with papers on the off corners, and then he collects from them, and then he in turn checks in to me."

the papers and the price charged the newsboys to whom they distribute the papers (R. 704, 709, 792, 810, 843). For the service of distributing and collecting for the papers, the checkmen receive from the News and the Herald weekly salary checks for sums constituting a flat wage which bears no relationship to the volume of papers handled but depends in amount upon the importance of the corner involved and the amount of time spent in doing the work (*Herald,* R. 636, 605–607, 616–629, 784–785, 810, 841; *News,* R. 1089–1093, 1129). The checkman are covered, insofar as they perform the above-described services, by other Federal legislation which applies to employees (*Herald,* R. 636, 784, 916–917, 936; *News,* R. 1090) and are carried on the pay rolls of the papers they serve (*Herald,* R. 606, 636; *News,* R. 1090).[4] At the time of the hearing the Herald employed 121 checkmen (R. 616–625) and the News employed 110 checkmen (R. 1091–1093). They constituted therefore, in the case of the Herald, approximately one-half of the number in the appropriate unit; in the case of the News, approximately one-third of the number (R. 189–190). Aside from the above-de-

[4] A description of the functions of the checkman is contained in *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 3 Cal. (2d) 759, 47 P. (2d) 270, and *Associated Indemnity Corp.* v. *Industrial Accident Comm.*, 128 Cal. App. 104, 16 P. (2d) 774, where such individuals were found to be employees under the California Workman's Compensation Act.

scribed duties which consume a few minutes a day (R. 785), the checkmen are in the same relationship to the newspapers which they serve as the other newsboys in the bargaining units, who, in fact, may be promoted to the status of checkmen after serving successfully as "off-spot" boys for a period of time (R. 707).

While only the Herald and the News employ checkmen, the Examiner in effect employs the same system of distributing its papers. "Main-spot" boys, assigned by the Examiner to these duties, leave copies of the paper with the "off-spot" boys, and later collect and account to the Examiner (R. 1381, 1437–1438, 1459–1464, 1478–1479, 1495–1496, 1521–1522, 1603–1605, 1609, 1614–1615, 1625). The sole divergence from the practice of the News and the Herald in this respect is that the "main-spot" boy on the Examiner does not bear the title "checkman" and, instead of receiving a fixed salary check, receives a varying sum in cash (R. 1437–1438), or is required to play his part in the newspaper's distribution system without compensation (R. 1468–1469, 1478–1479). The Times does not utilize "main-spot" boys; the papers are distributed directly to each newsboy in his district by the district manager (R. 1157).

The newsboys, including the checkmen, are "hired" and "fired," disciplined, directed, and controlled (see evidence collected pp. 13–21, *infra*) by respondents through supervisory employees known as the "district manager" or "district

man" (R. 549, 1180; *Herald,* R. 605–607; *Times,* R. 1156, 1254; *Examiner,* R. 1373, 1432; *News,* R. 1125, 1127–1129).[9] Each district manager is in immediate charge of the distribution and sale of papers in his particular district (*Herald,* R. 547–548, 558, 681; *Examiner,* R. 1373–1376, 1432–1434; *Times,* R. 1152, 1155–1156; *News,* R. 1080–1081). Each respondent has about 20 to 25 district man-

[9] That the district managers are employees of the respective respondents, as the Board found (R. 90, 468–469), is admitted by all of the respondents (*Examiner,* R. 1373, 1432; *Herald,* R. 605–606; *Times,* R. 1156, 1346), except the News. The News district managers are not compensated on a straight salary basis; they receive papers at one "wholesale" price and distribute them to the newsboys at another (R. 1082, 1127, 1130). They receive, however, a minimum guarantee from the News (R. 1128–1129). The record shows that they operate in the same manner as the district managers for the Herald, Examiner, and Times (R. 750, 789–792, 808, 810–811, 835, 903, 908, 1082–1083, 1098–1099, 1108, 1109, 1116). They "hire," "fire," supervise, distribute placards and racks belonging to the News, and hand out salary checks from the News to the checkmen (R. 750, 789–792, 811, 832–835, 903, 1082–1083, 1098–1099, 1108–1109, 1116, 1118–1120). The News offered no evidence to show that their district managers were not employees. Under all these circumstances, the Board was amply justified in concluding (R. 468–469) that the district managers of the News had no different status than the district managers for the other papers. However, in view of the fact that all the 200 "off-spot" boys in the News unit receive their papers through and account to the 110 News checkmen (R. 749–750, 790–791, 805, 808, 833–834, 899, 1089–1093, 1118, 1124, 1129), who, to the extent of such services, are admittedly employees (R. 1090–1093, 1637), the exact status of the News district man is of no particular importance to the case.

agers (*Herald,* R. 616–629, 643–644; *Examiner,* R. 1364; *Times,* R. 1155, 1298; *News,* R. 1126). The district manager works with a fixed and identified crew of checkmen or "main-spot" and "off-spot" boys (*Herald,* R. 572; *Examiner,* R. 1383–1384; *Times,* R. 504–521; *News,* R. 1091–1093). The number of checkmen or "main-spot" and "off-spot" boys under each district manager varies according to the nature of the district, whether it is residential or business. Illustrative, however, is Herald District Manager France with 13 checkmen and 15 other newsboys (R. 707), News District Manager Moore with 10 checkmen and 20 to 30 other newsboys (R. 1126), Times District Manager Dyer with 31 to 33 newsboys (R. 1284) and Examiner District Manager Volanty with 20 "main-spot" boys and 13 other newsboys (R. 1521). The district managers assign the newsboys to their locations (*infra,* p. 14), and form the primary point of contact between the publisher and the newsboy. District Manager Plotkin of the Herald accurately describes the job: "my duties consist of supplying the men papers on the corners and collecting from them in the evening and going around and seeing that they are at work" (R. 681; see also, *News,* R. 1125, *Times,* R. 1155–1159, 1281; *Examiner,* R. 1374–1380).

In order to insure effective presentation of the paper to the public, the district manager keeps the newsboys informed as to how news is develop-

ing, what special events require their presence, how to call important headlines, and how to play up special features (*Herald*, R. 578–579, 598–599, 794, 806–807, 873; *Examiner*, R. 1363; *Times*, R. 1220). Finally, an important aspect of his functions consists of fixing the amount of papers to be allotted to each newsboy in his district (*Herald*, R. 607, 910–911, 1052; *Examiner*, R. 1424–1425, 1485, 1589–1590, 1602–1603, 1606, 1624; *Times*, R. 1156–1157, 1178, 1285, 1293–1294; *News*, R. 789).[20] Even when a newsboy is allotted papers on a standing order based upon his past experience, as in the case with the Herald in the residential areas, the newsboy is permitted only to vary the number received from the district manager in a particular edition and not the total for the day (R. 607, 771–772, 782–783, 785–786) and has, in addition, no control over the number of extra copies which the district manager allots him (R. 709–710, 752–753).

Both the Examiner and the Herald employ, in addition to a district manager, men known as "checkers" who patrol the district noting whether the checkmen and newsboys are on the job and performing their duties (*Examiner*, R. 1446–1447,

[20] Illustrative is the testimony of Herald Newsboy Kahn that, "I have got to take what they give me" (R. 910); of Newsboy Steuart of the News that he is allotted as many papers as the district manager "figures I should have" (R. 789); of Examiner Newsboy Nixon that he had "positively no voice in" determining the number of papers he received (R. 1606).

1450–1451, 1484–1485; *Herald,* R. 575–577, 748, 900–901). The checkers make written reports to the Herald and the Examiner, and in the event any newsboy is to be discharged, disciplined, or reprimanded, a written instruction to that effect is given to the district manager, who in turn takes appropriate action (*Examiner,* R. 1446–1451, 1484–1485; Herald, R. 575–578, 748, 900–901). On the News and the Times the district managers themselves keep a close check on these matters (*News,* R. 733, 737–738, 756, 777–778; *Times,* R. 1221–1222, 1330–1333).

The district managers of each paper and the checkers on the Herald and Examiner are under a circulation manager (*Examiner,* R. 1349, 1352, 1446–1448; *Herald,* R. 544–545, 575–578; *Times,* R. 1151; *News,* R. 1079). In addition, certain of the papers have an intermediate supervisory official between the circulation manager and the district manager, known variously as branch manager, supervisor of street sales, or street sales manager (*Herald,* R. 548–549, 574, 584, 640; *Examiner,* R. 1362–1363; *Times,* R. 1152, 1154). On occasions newsboys who were "fired" by their district manager would appeal to one of these intermediate supervisors (*Herald,* R. 730–731, 902; *Times,* R. 1161). Thus, after Times Newsboy Fields was removed from his corner for tardiness, he was reinstated by the supervisor of street sales with instructions to be at his corner on time (R. 1330–1333). Cohen, super-

intendent of street sales for the Times, testified that he took up an average of four or five such complaints a week from newsboys (R. 1162, 1176–1177). Changes in the price of Heralds, or in the manner of display, or announcements of the time when an extra is to be on the streets are relayed from the circulation manager to the branch managers, who inform the district managers, who in turn instruct the checkmen and newsboys (R. 562–564, 579). The Herald superintendent of street sales, Bell, often walks or drives around the streets, or sends out an assistant, to see how papers are moving, and in the event he finds a newsboy absent from his corner he takes the matter up with the newsboy or sends an assistant to do so (R. 591). When a report comes into the office that the newsboy on an important corner is absent, the circulation manager or district manager sends out a boy from the staff available for the purpose at the office (R. 551, 566–567).

The newsboy obtains employment by applying to the district manager, who then assigns him to a particular spot if an opening is available (*Examiner,* R. 1404, 1436, 1438–1439, 1453–1454, 1456–1457, 1494–1495, 1527; *Herald,* R. 590, 595, 606, 638, 696, 714, 746, 848–849, 879–880, 924, 1026; *Times,* R. 1181–1182, 1185, 1230, 1250, 1212–1214, 1254, 1160; *News,* R. 1098–1099, 1108, 1116). All respondents also furnish transportation to the newsboys from the plant to their respective cor-

ners and after work is over bring them back (*Examiner,* R. 1566; *Herald,* R. 995–996; *Times,* R. 1157, 1180, 1183–1185, 1170–1171, 1202, 1213–1215, 1223–1225, 1228, 1246, 1252, 1254, 1345; *News,* R. 1115).[11]

Not only are the newsboys subject to removal at will by the district manager without liability to the publisher but they are also subject to transfer or disciplinary lay-off by the district manager (*Herald,* R. 483, 601, 717, 729–731, 739–740, 741, 746–747, 801–802, 821, 876, 878, 901–902, 917–918, 1121–1123, 1146–1147; *Examiner,* R. 1404–1408, 1410–1411, 1455–1456, 1458–1460, 1470, 1477–1478, 1525; *Times,* R. 1161, 1185, 1187–1189, 1191–1192, 1221–1223, 1329–1333; *News,* R. 1109).[12] Besides

[11] The Times hires 12 cars for the sole purpose of transporting newsboys to their spots every night (R. 1170–1171, 1345).

[12] Illustrative are the following instances:

With respect to the Examiner, a newsboy was transferred to a less desirable spot despite his protest that he "wouldn't make even a dollar" there (R. 1455–1456), on another occasion the same newsboy was told by his district manager that "I am not going to use you" (R. 1470); and another newboy was laid off for one night because of a complaint that he wore a C. I. O. button (R. 1410–1411); with respect to the Herald, on several occasions newsboys were laid off for having too many returns (R. 901–902, 876), another newsboy was laid off for a few days for being drunk (R. 601), on another occasion a newsboy was laid off for 2 or 3 days because he left his corner to go to the toilet (R. 900–901), one newsboy was threatened with discharge for selling papers for less than the advertised price (R. 878), and a number of newsboys were laid off for several days or transferred to different corners because of complaints against them and despite the fact that the district manager found some of the

the control implicit in respondents' removal and disciplinary powers,[13] respondents exercise extensive day-to-day supervision over the manner in which the papers are sold and the diligence used in selling them.[14]

Instances of the detailed supervision to which the newsboys are subjected are commonplace in the record. Thus, instructions were given to the News and Herald newsboys with respect to the exact manner in which they should hold the two papers.[15] News and Herald district managers in-

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complaints to be without merit (R. 1146–1147, 739–740, 746–747); with respect to the Times, two corners were consolidated without consulting or advising the newsboys involved, thereby depriving one of them of work until another corner became vacant (R. 1329–1330), one newsboy was removed for leaving his spot to take refuge under a drive-in stand during a rainstorm (R. 1221–1223), and another newsboy was laid off for arriving late at his corner (R. 1330–1333); in the case of the News, a newsboy was transferred to another corner without being given any choice in the matter (R. 1109).

[13] These powers were succinctly summarized by District Manager Volanty of the Examiner and Woods of the Herald during arguments with their newsboys by such reminders as: "Don't forget, I am still your boss" (R. 1406–1408, 716–717).

[14] The latter is a natural consequence of the district manager's and checkman's duty "to see that they [the newsboys] are working" (R. 681, 694).

[15] On November 1, 1937, the Herald and the News entered into an agreement for the handling of both papers by one set of newsboys (R. 558–559). Those handling the News were for the most part eliminated and the Herald boys were told to handle both papers (R. 564–565, 692–693, 749, 1066, 1071, 1635–1636).

structed the newsboys that, in holding both papers, the News was to be folded and placed on the outside of the Herald so that the headlines of both papers would be visible (*News*, R. 725–726, 750–751, 1120; *Herald*, 563–564, 642, 796, 832–833). Branch Manager Brewster of the Herald testified that he requires his district managers to see that the Herald is carried on the inside of the boy's arm next to the body and the News folded and displayed on the outside (R. 642–643). In the case of the News, the district manager directed a checkman to keep one of his "off-spot" boys in a traffic spot at certain times (R. 1118–1120). In the case of the Times, a newsboy was instructed at various times to "work traffic and cover this drive-in stand"; to "watch them cars in there every 10 or 15 minutes"; to "go in the bar and flash your papers," but that the management objected to "blast[ing] your headline"; to "hold your paper up and give the customers a chance to see the paper"; not to "cause any disturbance * * * [and] go right back to your safety zone" (R. 1218–1219). Another newsboy was ordered not to handle the Examiner (R. 1243–1244). In the case of the Herald, the district manager instructed a newsboy to "always play that safety zone," an instruction which the newsboy followed although he could sell more papers by remaining on his corner (R. 909–910), and another newsboy was instructed to stand in the traffic zone to catch the

autos (R. 818). In the case of the Examiner, a newsboy was at various times directed to "work the market around there and watch the corner, and also work the white [traffic] line," and to "watch the Times guy" to see that he did not reach customers first (R. 1458, 1460). Another newsboy was asked to insert Legion supplements into papers at the time of the American Legion Convention, an assignment which lasted 1 hour, and also to supply papers to the Phoebe Hearst Post free of charge (R. 1482–1484). Further examples are set forth in the margin.[16]

[16] Examiner: When Newsboy Latham had sold all but one paper of an early edition and was sitting on a fireplug, District Manager Jackson criticized him for not working and ordered him to "get out there and sell those papers" (R. 1461–1462); on another occasion Jackson put an "off-spot" boy at Latham's intersection despite the latter's protest that it would cut his earnings (R. 1463–1464, 1473); on another occasion Jackson ordered Latham not to handle the Times (R. 1455). When Newsboy Deering was assigned to a spot in front of the entrance to the Pacific Electric Station, District Manager Pierce ordered Deering to stand on the sidewalk despite the latter's protest that he could sell more papers by standing directly against the building (R. 1497).

Herald: District managers refused to let the newsboys select their own relief men when they wanted to take a vacation; would not permit the newsboys' friends to "hang around" the corner; and warned the boys to discontinue certain practices concerning which complaints had been received (R. 716–717, 754–755, 1040).

Times: District Manager McKinney ordered Newsboy Eley to leave a paper at the drug store for which Eley would not be charged, to go to a certain liquor store and

The amount of time which the newsboys must devote daily to selling papers is measured not by the disposal of a fixed quantity of papers but by continuous selling activities for a relatively definite number of hours (*supra*, p. 5; *Herald*, R. 598, 613, 942, 948, 1026–1027; *Examiner*, R. 1430, 1467–1468, 1480–1481, 1585, 1601–1602, 1608; *Times*, R. 1159, 1202–1203; *News*, R. 1098–1099, 1125–1126). They are required to be at their posts from the time the papers customarily arrive until the close of the selling day and failure to adhere to this requirement results in reprimand or discipline (*Herald*, R. 590–591, 727–728, 747–748, 793, 795, 830–831, 880–881, 896–899, 928–929, 942–943;

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restaurant where he would make a sale, and then to come "back to the corner, to work through the market, and get out on the traffic line" (R. 1183–1184); when Eley was given a "main spot" on the corner, McKinney gave him directions about covering a newly completed "drive-in stand" and told him to tell the "off-spot" man what to do (R. 1186, 1187); when sales declined, District Manager McKinney removed the "off spot" man, ordered Eley to take care of that spot also, and directed him to give some papers to the Examiner boy on that corner but to charge him 3 cents per paper instead of the "wholesale" price (R. 1191–1192); District Manager Curtis reprimanded Newsboy Roberts for taking refuge in a drive-in stand during a rain, telling him he had to get out and hustle in the downpour (R. 1222).

News: Newsboy Steuart was repeatedly ordered by the district manager for the News always to keep a News on display in the rack (R. 756, 777–778). So was Newsboy Smith (R. 1098). Newsboy Spampinato was told by the News District Manager to put certain advertising placards on a box (R. 835).

Examiner, R. 1380, 1394–1395, 1398, 1434, 1446–1447, 1462–1463, 1487, 1587–1588; *Times*, R. 1184, 1202–1203, 1224–1225, 1250–1251, 1330–1333; *News*, R. 733, 737–738, 1098–1099, 1119–1120).

Illustrative are the comment of Herald Newsboy Bryant that he was not his own boss because "I can't open my business when I like and can't close it when I like" (R. 928), and the testimony of Herald Newsboy Kadesh that he arrived in the morning before the papers did and was not permitted to quit before closing time even though he had sold out (R. 793–795). Similarly, an Examiner newsboy testified in response to the question why he remained on the corner on Saturday afternoons when he sold only a very few papers (R. 1608), "Well, if I didn't stay I would be summarily discharged. * * * You have to stay, in other words, it is part of the job." Times Newsboy Eley was instructed "to work until 11 o'clock," at which time he always checked in regardless of whether or not he had sold out (R. 1184, 1202–1203); and another Times newsboy was told by his district manager to report each day at 4:30 (R. 1250–1251). In the case of the News, the district manager ordered a newsboy to be at his corner between 4:30 and 5:00 in the morning and work until 10:30 and check in at the Pacific Electric Station (R. 1098–1099), and reprimanded another newsboy for being away from his corner, stating "You know that you have to be

all the time on this spot" (R. 733, 737–738). Additional examples are set forth in the margin.[17]

In addition to the control exerted over the extent of the newsboys' selling territory and over the number of units to be sold (see, *supra*, pp. 12–14), respondents further control the newsboys' earn-

[17] Herald: The district managers reprimanded a newsboy who left early because he had sold out, stating, "You know better than to quit before 8" (R. 795); instructed another newsboy to make sure that his relief man did not leave 2 minutes early (R. 747–748); and warned another newsboy, who left his corner to eat lunch, that if he did not watch out he would be removed from his corner (R. 728). Bell, Superintendent of Street Sales, testified that when he made an inspection tour and found newsboys who were not on their corners, he asked them "where they have been so long; why didn't they stay on their corner" (R. 590–591).

Examiner: District Manager Pierce of the Examiner reprimanded a newsboy for being away from his corner for a while, warning him that the spot had to be covered during the entire period "regardless of whether there is one paper sold here" (R. 1484–1485). A number of newsboys testified that they had to "check in" at a time and place designated by the district manager (R. 1468, 1487, 1587–1588, 1616, 1621); one newsboy was told to be at his corner at 6 o'clock although the papers did not arrive until 6:45, and to "check in" at a designated cafe (R. 1623); another newsboy, who was discovered eating lunch in a drug store, was reprimanded and told to "get a sandwich and stay outside on the corner" (R. 1462–1463). The district managers admitted that they "tell them [newsboys] what time [they] will be" at a corner to "dump" the papers, and designate the time and place for "checking in" (R. 1380, 1394–1395, 1398, 1434). It was the duty of the checkers to report newsboys who were off their corners (R. 1446–1447).

Times: Newsboy Roberts was permitted to take a day off only after his district manager had obtained a relief man;

ings. The district manager charges the newsboy for the difference between the number of papers distributed to him and the number returned unsold (*Herald,* R. 1052;[18] 903–904, 911–913; *Examiner,* R. 1384–1385, 1485; *Times,* R. 1195; *News,* R. 847, 851, 888, 1104). The amount charged by the district manager for each paper is set by respondents[19] and is less than the selling price to the public, which is also determined by respondents and published on the masthead of each paper (*Herald,* R. 570, 655, 878, 1040; *Examiner,* R. 1366, 1566; *Times,* R. 1158, 1160, 1194–1195, 1232, 1258; *News,* R. 1084, 1128). The sale of newspapers by the newsboy thus involves, as a general rule, neither risk of capital nor free opportunity for profit since the

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Roberts was then told to "go ahead and report back tomorrow evening" (R. 1224–1225). Shortly after Newsboy Fields had been removed from his corner for tardiness, he was reinstated by the Supervisor of Street Sales, with instructions to be at his corner on time (R. 1330–1333).

News: As a result of an agreement entered into in 1937 between the News and the Herald, the News has, for the most part, used Herald newsboys (*supra,* p. 16). For this reason, the record contains fewer instances specifically pertaining to the News.

[18] The Herald credits the newsboy with all unsold returned papers in the downtown area; in the residential district where the boys have standing orders, they are credited with the return of all papers in excess of such orders and in addition are allowed credit by the branch manager or the district manager in the event that an unusually large number of papers in the standing order are unsold (R. 648–650, 651, 657–658, 709–710, 752–753).

[19] Except in the case of the News where the district manager sets the figure (R. 91, but see R. 1126–1128).

stock of papers he has available for sale, the market in which he may sell them and both purchase and selling prices are unilaterally fixed by respondents. The financial return to the newsboy is purely a return for labor.

To further the effective distribution of the newspapers, respondents supply the newsboys with racks, change aprons, advertising placards and similar equipment and the district managers furnish specific instructions to their newsboys with regard to the display of newspapers in the racks and the posting of advertising materials, (*Examiner,* R. 1366, 1367, 1371–1372, 1369, 1485–1487, 1500–1501, 1586, 1606–1607; *Herald,* R. 590, 732, 755–756, 810, 813, 834–835, 838; *Times,* R. 1163, 1165, 1167, 1168, 1172, 1190–1191, 1217, 1220–1221, 1251–1256; *News,* R. 810–811, 835, 903, 908, 1082–1083, 755–756, 1098, 1105, 1106–1107).

Some, but not all (*Herald,* R. 904; *News,* R. 1104, 1111; *Times,* R. 1243–1244, 1628; *Examiner,* R. 1419, 1473, 1592, 1611, 1622), of the newsboys sell publications other than those involved herein, such as magazines or newspapers of noncompeting character [20] (*Herald,* R. 718, 734–735, 779–780, 806, 822, 837, 849, 908, 932, 941–942, 945–946, 1027–1028; *Times,* R. 1260–1267; *Examiner,* R. 1464–1465, 1471–1474). The sale of such publications constitutes only a relatively minor aspect of the

[20] *E. g.*, Ham and Eggs, Jewish Forward, People's World, Socialist Call (R. 1260–1261).

newsboys' activities (*Herald,* R. 754, 780, 786–787, 806, 843–845, 889, 908, 923, 941–942; *Examiner,* R. 1622–1624; *Times,* R. 1271–1272; *News,* R. 1112). There was also an arrangement created by the Herald and News for the handling of both papers by a single set of newsboys (*supra,* p. 16) and, at some corners the Times and Examiner made joint distribution arrangements (R. 1239–1240, 1329–1330). The newsboys, in addition, in some instances (but see *Herald,* R. 827, 849–850, 890, 908, 1027; *News,* R. 1097, 1103–1104, 1111; *Times,* R. 1191, 1208, 1243–1244, 1251, 1325–1326, 1628; *Examiner,* R. 1326, 1449, 1455, 1473, 1592, 1611, 1622, 1628)[21] arrange among themselves for the afternoon newsboy to handle small quantities of left-over morning papers, and *vice versa* (*Herald,* R. 719, 734, 778, 780, 846–847, 886–887, 922, 932, 941, 982–983; *Times,* R. 1266, 1278; *Examiner,* R. 1426, 1617, 1622–1623), and occasionally for the handling of a few copies of competing papers for their mutual accommodation (*News,* R. 1103–1104, 1108, 1111–1112; *Times,* R. 1261–1262, 1271–1272, 1277; *Examiner,* R. 1417–1418, 1617–1618).

Except where the publishers themselves have combined their distribution arrangements, each of the newsboys is identified with only one of the

[21] The record shows not only that many of the newsboys sold one paper exclusively but that in some instances they were expressly instructed not to handle others (*Herald,* R. 753–754, 773–774, 819; *Times,* R. 1243–1244, 1251; *Examiner,* R. 1455).

companies involved herein (see *supra*, pp. 14–20, 24 and cf. R. 504–521, 616–629, 1091–1093). A newsboy is an Examiner or a Times newsboy because the paper involved has assigned him an exclusive selling territory and furnished him a product to sell. While he may, to a small extent "handle" other publications in order to supplement his income, he "hustles" only one paper and is officially accountable only to one publisher (*Herald*, R. 778, 780, 806, 820, 845, 853, 888–889, 908, 923; *Times*, R. 1243–1244, 1251, 1277, 1279; *Examiner*, R. 1431, 1448–1449, 1618; *News*, R. 778, 780, 806, 845, 853, 888–889, 893, 908, 923, 1108).[22]

The checkman and newsboys regard themselves as employees (R. 820, 825, 853, 871, 893–894, 898, 1464), are so regarded by representatives of respondents (R. 585, 696, 717, 802, 820, 1116, 900, 1122, 1332, 1484), and by the public (R. 483, 746–747, 969–972, 1040, 1122–1123). They formed the Union (R. 867, 872), which sought to negotiate with respondents in their behalf (R. 668–673), and adjusted grievances through collective action (R. 554, 659–677, 873–874, 984–985, 1085–1086, 1162–1163).

[22] Illustrative is the testimony of Herald Newsboy Steuart with respect to the copies of the Times and the Examiner left with him by the morning newsboy (R. 778): "He leaves them in the rack on display. I don't carry the Examiner and Times. I just leave them here. Any that are sold, I just take the money and check in to him in the evening."

Upon petitions filed in the court below by each of the respondents (R. 1699, 1738, 1764, 1806), the court, one judge dissenting (R. 1851), set aside the orders of the Board upon the ground that respondents' newsboys are not employees (R. 1843–1851). The court held (1) that the Board's ultimate finding that the newsboys here involved are employees was one of law upon which the court was entitled to exercise a judgment entirely independent of that of the Board, (2) that the word "employee", as used in the Act, must be given its usual common law significance, and (3) that, under the common law tests, the newsboys are not employees but independent contractors. The dissent asserted that the Board's inference of an employment relationship was a reasonable one and hence should have been left undisturbed (R. 1852).[23]

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Board's denial of respondents' claim of exemption from the statute was improper.

2. In holding that the newsboys are "independent contractors."

3. In holding that the issue presents a question of law for the court to decide for itself and in

[23] The court rejected a contention by respondents that the activities of the newsboys here involved do not affect interstate commerce (R. 1845) and failed to pass upon respondents' claim that the unit found by the Board was inappropriate for collective bargaining purposes.

failing to give any weight to the Board's determination that newsboys are employees within the meaning of the Act.

4. In holding that the Board is required to follow the common law definition of employment without regard to the policies or context of the Act.

5. In failing to hold that the relationship involved herein is a personal service relationship which, even under common law standards, clothes the newsboys with employee status.

6. In setting aside and denying enforcement to the Board's orders.

SUMMARY OF ARGUMENT

I

The common law of master and servant does not define the employment relationship under the Act. This Court has recognized that the term "employee" is not a word of art but varies in meaning from statute to statute depending upon the context in which it is used. Not only the purpose and policy of the Act but also its plain language make it clear that Congress intended the scope of the Act's application to be governed by factors in addition to those relevant at common law.

The purpose of removing obstructions to commerce which arise from industrial strife and the policy of accomplishing this by encouraging collective bargaining show that Congress was concerned with problems of modern labor relations

foreign to the common law of master and servant developed in days of a handicraft economy and concerned with tort liability. The language of the Act, moreover, precludes a construction that Congress intended exclusive resort to the common law for a determination of coverage.

In any event, the application of the Act does not turn upon the interpretation of the common law of master and servant obtaining in the particular state in which the threat to commerce arises.

II

The Board's determination of the existence of an employment relationship, if it is not arbitrary and is supported by the evidence, is conclusive.

This Court, in recent cases, has held that where Congress has authorized an administrative body to determine a matter, even though it involves a question of the applicability of a statute, a reasonable exercise of the administrative judgment is binding upon the courts. The application of the term employee as used in the Act comes within this principle. There can be no official Board action, either in an unfair labor practice case arising under Section 10 or in a representation case arising under Section 9, unless the employment relationship is present. The determination of the existence of the employment relationship is therefore one which has been placed by Congress within the

jurisdiction of the Board. The determination involves the exercise of the Board's expert judgment. It must determine in each case whether the individual whose status is in question bears such a relationship to a given industry as to be appropriately a party to collective bargaining. To reach this determination the Board must consider whether the individual is engaged in a service relationship, whether the problems engendered by this service relationship may properly be the subject of collective bargaining, and whether there are other workers similarly situated so that bargaining on a collective basis is possible and not merely apply common law tests created for purposes of tort liability.

III

The Board's determination that the newsboys here involved are employees within the meaning of the Act is supported by substantial evidence. The newsboys are engaged in the performance of a service for respondents. They are hired and fired at respondents' will. Their hours, place of work, and rate of compensation are fixed by respondents. They constitute a labor force performing the same tasks for the same respondents daily over the years. Since the newsboys have neither special skill nor capital, their relationship generates problems of wages, hours, and working conditions as to which their bargaining position

is grossly disproportionate to that of the publishers. They formed a union which met with the publishers to adjust grievances and sought to bargain collectively. In the elections conducted by the Board a majority of the newsboys of each publisher voted to have the union act as their collective bargaining representative.

IV

The newsboys here involved are employees even under the usually accepted common-law tests. The publishers not only retained the right to direct the manner in which the newsboys performed their work and the result to be accomplished, but did in fact, as the Board found, exercise that right extensively. The newsboys are not engaged in a distinct occupation or calling. The publishers assign the newsboys the places at which they work and provide all the equipment needed. The newsboys may be discharged at will. The foregoing attributes have been held sufficient at common law to establish an employment relationship. The common-law cases likewise recognize that recompense by the difference between a purchase and a sale price, the hiring of assistants, or the purchase of a location is consistent with an employee status.

ARGUMENT

I

The Common Law of Master and Servant Does Not Define the Employment Relationship Under the Act

It is fundamental that statutes are to be construed in the light of the purposes sought to be achieved and of the evils sought to be remedied. The courts have made this sharply apparent in areas where the application of federal policy depends upon the establishment of an employment status or occupational classification. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Warner* v. *Goltra,* 293 U. S. 155; cf. *Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547 (C. C. A. 2), certiorari denied, 235 U. S. 705; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52 (C. C. A. 8); *Fleming* v. *Palmer,* 123 F. (2d) 749, 762 (C. C. A. 1) certiorari denied, 316 U. S. 662; *General Wayne Inn* v. *Rothensies,* 47 F. Supp. 391 (E. D. Pa.); *Stone* v. *United States* (E. D. Pa.), decided September 16, 1943, C. C. H. Unemployment Insurance Service, Fed., Par. 9077.

In the *Trucking Associations* case this Court confined the term "employee" in Section 204 (a) of the Motor Carrier Act of 1935, which authorizes

the Interstate Commerce Commission to regulate the hours of service of motor carrier employees, to those employees whose duties affect safety of operation. In thus subordinating the literal meaning of the term "employee" to the purpose of the statute, the Court held that the term "is not a word of art" having a definite meaning but "takes color from its surroundings" (310 U. S. at 545), and that because Congress has varied the meaning of the term "employee" not only from statute to statute but even within a single statute, it must be construed in accordance with the legislative intent underlying the statute in which it appears.[24] In the *Lehigh Valley* case, *supra,* similarly Judge Learned Hand said (at pp. 552–553): "The word 'employed,' * * * must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. * * * Such statutes * * * should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."[25]

The court below ignored the distinctive purpose and policy of the National Labor Relations Act and equated the definition of employment in Section 2 (3) of the Act with the common law of

[24] The use of "employee" in different federal statutes is reviewed in note 29, p. 545 of the *Trucking Associations* case.

[25] Compare Restatement of the Law of Agency, Section 220, Comment on Subsection (1) (d).

master and servant. We believe that not only the purpose and policy of the Act but also its plain language furnish the basis for a distinctive and broad definition of employment and that neither the common law nor definitions contained in other statutes limit the reach of the Act.

The purpose is the removal of the obstructions to commerce which arise through the denial by employers of the right of workers to organize and bargain collectively. It is the Act's policy to redress the inherent inequality of bargaining power between employees and employers by encouraging collective bargaining. (Section 1 of the Act.) Therefore, it is clear that, to the extent workers who are not expressly excluded from the Act's coverage are able to achieve equality of bargaining power concerning the terms and conditions of their employment, the purposes of the Act are vindicated; the broad test of coverage under it is, then, the collective bargaining concept. To avoid industrial strife collective bargaining is to be promoted among those who need it. Only a broad interpretation of the term "employee" is in keeping with this objective.[26] Moreover, in Section 1 of the Act, Congress expressly stated that the public policy was to be promoted by protecting not "servants," nor even

[26] Compare *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 537 (C. C. A. 9), certiorari denied, 306 U. S. 646.

"employees" in their rights to self-organization, but "workers." [27]

Thus, the purpose of the Act reflects the Congressional intent to deal with the realities of the modern employment relationship. Such a purpose is inconsistent with rigid acceptance of the common law test. A threshold obstacle to the acceptance of such a standard is created by the fact that it attributes to Congress an intention to bottom a statute designed to further collective bargaining upon a heritage of a handicraft economy to which such bargaining was unknown.[28] It ignores the fact that the common law of master and servant is concerned with the vindication of private rights and that the Act protects public rights;[29] that it is directed, not to the risk of injury by a servant to a third party (*e. g.*, Re-

[27] "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by *workers* of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 1. [Italics supplied.]

[28] See Commons, John R. and Associates, *History of Labour in the United States*, Vol. I (1936), p. 604.

[29] See, e. g., *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 369; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193, 194.

statement of the Law of Agency, Ch. 7), but to the risk of industrial disputes in interstate commerce.[30] In contrast to the preoccupation of the common law with whether the power to control the physical conduct of another justifies the finding of the master-servant relationship, the dominant theme of the Act, collective bargaining, requires a definition of employment which looks to control over the economic aspects of the relationship, such as wages and hours, regardless of whether there exists in the employer a right to intervene in the way in which the work is being done.[31] The common law master and servant re-

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[30] "We are dealing here not with private rights * * * nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants * * *" (*Machinists* case, 311 U. S. at 80); "the problem is not to be approached from the standpoint of vicarious liability," *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 72 (C. C. A. 3), quoting from *Consolidated Edison Co.* v. *National Labor Relations Board*, 95 F. (2d) 390, 394 (C. C. A. 2), aff'd on this point, 305 U. S. 197. "The main if not the only purpose of the act, is to prevent obstructions to interstate and foreign commerce. * * * Congress was dealing with causes of obstructions affecting commerce, and not with the relationship of master and servant as such." *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 536–537 (C. C. A. 9), certiorari denied, 306 U. S. 646.

[31] The entire Act and its interpretation by the Board is an attempt to establish legal principles which give proper weight to the extensive *economic* control to which modern workers are subject. It is not primarily the worker's subjection to control of his "physical conduct in the performance of the service" (Restatement of the Law of Agency, Sec. 220 (1)) but rather to control of "his daily wage for

lationship is a periodic concept which depends for its existence upon the presence at a given moment in time of conditions requisite to legal liability. On the other hand, the realities of collective bargaining command a broader regard for

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the maintenance of himself and family" (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209) which creates the need for collective bargaining. Nor do workers ordinarily strike because they cannot have their way with respect to how their work should be done. It is the employer's control over wages, hours, and all working conditions—not merely the physical method by which the work is done—to which collective bargaining is addressed. It is control of this kind which results in the identification by the Board of affiliate and parent corporations and other entities not immediately in the employment relationship as employers for bargaining purposes and it is this realistic type of control which leads to the establishment by the Board of multiple-employer bargaining units (*infra*, p. 60). Similarly the entire concept of employer coercion and interference draws vitality from the economic, and not the physical, control of the employer and has resulted in the application of the sanctions of the Act to, and because of the conduct of, those who use such control to influence employee self-organization regardless of whether they may physically control the conduct of those whom they seek to influence. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 77, 81; *National Labor Relations Board* v. *Taylor-Colquitt Co.*, decided November 8, 1943 (C. C. A. 4), 13 L. R. R. 394; *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 871 (C. C. A. 5), certiorari denied, 310 U. S. 651; *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. (2d) 1020, 1022, 1023 (C. C. A. 6); *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567, 569–570 (C. C. A. 7); *National Labor Relations Board* v.

the worker's general status" and his continuing relationship to the subject matter of collective bargaining, whether or not he is "employed" (as that word might be defined under the narrowest common-law formulation) at a particular point

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M. A. Hanna Co., 125 F. (2d) 786, 788, 789 (C. C. A. 6); *National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. (2d) 363, 365, 367 (C. C. A. 6); *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368, 371 (C. C. A. 9); *National Labor Relations Board* v. *Arcade-Sunshine Co.*, 118 F. (2d) 49, 50–51 (App. D. C.), certiorari denied, 313 U. S. 567. In the debates on the bill which subsequently became the Act, both Senator Wagner, the sponsor of the bill, and Senator Walsh, chairman of the committee which reported the bill out, repeatedly emphasized that the Act was concerned with "the economic pressure of employers," not with their control over the workers' physical movements. 79 Cong. Rec. 7670–7671, 7678, 7658, 7653, 7655, 7654, 7661.

[32] Compare, Gall and Smethurst, *A Critical Analysis of the Federal-State System of State Unemployment Compensation Laws*, 3 Laws and Contemporary Problems, pp. 123, 127; "At common law the relationship of master and servant was marked out under the law of contract and tort. Well-established distinctions carried us into the law of principal and agent, or succeeded in creating a new relationship of independent contractor. Under modern statute law, the emphasis has shifted from contract to status, and delineation of the employer-employee relationship has been controlled by the impact of public policy represented in modern legislation. For example, the relationship under workmen's compensation laws and employer's liability acts is defined to relate the employer's liability to the degree of control exercised over the employee or his place of employment. Under more recent legislation pertaining to labor disputes, the relationship of employer and employee is differently defined [citing the National Labor Relations Act] to effectuate an entirely different public policy."

in time. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206; *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586 (C. C. A. 2), certiorari denied, 313 U. S. 594.[28]

The language of the Act not only embraces all those to whom collective bargaining may appropriately be applied but fixes a standard of coverage which differs from the scope of the common law master and servant relationship. Section 2 (3) of the Act reflects the Congressional intent to define "employee" in a broad, non-technical sense and to promote the collective bargaining relationship. This section states:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

The intent to expand the employee relationship is apparent from this definition. A purpose to

[28] See also the Board decisions cited in notes 64–78, pp. 61–63, *infra*.

shape this broad view of employment to the contours of the collective bargaining relation is reflected in the phrase "and shall not be limited to the employees of a particular employer" [34] as well as in the preservation of the employee status of strikers and those deprived of work in consequence of an unfair labor practice. The portions of the definition just given indicate the distance of the Act from the common law of master and servant, for persons discharged as a result of an unfair labor practice and those not employees of a particular employer are plainly not common-law servants.[35] The scope and nature of the Act's employment concept are apparent not only from its

[34] The expression "shall not be limited to the employees of a particular employer" is, as the Court has pointed out (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 191–192), "not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. * * * The broad definition of 'employee,' 'unless the Act explicitly states otherwise,' as well as the definition of 'labor dispute' in § 2 (9), expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.' H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9; see also S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7."

[35] Similarly the Act has been held to protect those discriminated against in the hiring process but who had never become employees in the usual sense of the term. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177.

general inclusions but from its exclusions as well. The Act exempts domestic servants and agricultural laborers—the classic types of common-law servants."[36]

The term "employee" is used in the Act interchangeably with still broader terms. In the statement of policy "workers" were named as the ones to be protected. In Section 2 (9) "labor dispute" includes a controversy concerning the representation, not of employees, but of "persons."[37] In Section 2 (3) "employee" includes

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[36] In *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. (2d) 78, 80 (C. C. A. 9), certiorari denied, 310 U. S. 632, 311 U. S. 724, the court thus presented the reason for these exemptions: "The purpose of the Act is clear and we find the Act specifically excepting three kinds of employees from its provisions. It would seem profitable to consider whether or not there is a 'common denominator' in these three exceptions. We think there is. Why is 'any individual employed by his parent or spouse' exempted? Because (not excluding other reasons) in this classification there never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain. The same holds good as to 'domestic service,' and the same holds good as to 'agricultural labor' if the term be not enlarged beyond the usual idea that the term suggests."

[37] "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of *persons* in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." Section 2 (9). [Italics supplied.]

"individuals" whose work has ceased because of a current labor dispute.

This Court has already had occasion to apply Section 13 (c) of the Norris-LaGuardia Act, 47 Stat. 73 (29 U. S. C., § 113 (c)), which defines "labor dispute" in terms identical with those in the National Labor Relations Act.[38] In *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, this Court reversed a decision of the Seventh Circuit Court of Appeals which held that no labor dispute existed within the meaning of the Norris-LaGuardia Act. The Seventh Circuit had rested its decision on the ground that the vendors of milk there involved "are independent contractors. * * * They buy and sell for their own profit and are not salaried workers" (108 F. (2d) 436, 442). This Court said (311 U. S., at 98–99):

> * * * plaintiffs' evidence showed that the "vendors" were actually regarded as employees of the plaintiff dairies. * * *
> * * * To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no "labor dispute," is to ignore the statutory definition of the term; * * *

On any view, it would seem clear that the application of the Act cannot be made to turn on the in-

[38] The Senate Report on the Act points out that the definition of "labor dispute" is copied from the Norris-LaGuardia Act (S. Rep. No. 573, 74th Cong., 1st Sess., p. 7.)

terpretation of the common law obtaining within the particular state where the threat to commerce arose. The Act could scarcely serve the purpose which Congress intended of removing obstructions to interstate commerce if its operation depended upon the diverse and inconsistent local definitions and refinements of the employment relationship.[39] Uniformity is a manifest essential to the effective

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[39] As to newsboys, compare the cases cited by the court below (R. 1849) with *Salt Lake Tribune Publishing Co.* v. *Industrial Commission*, 99 Utah 259, 102 P. (2d) 307; *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 3 Cal. (2d) 759, 47 P. (2d) 270, reversing 38 P. (2d) 809; *In re Scatola*, 282 N. Y. 689, 26 N. E. (2d) 815; *Wilson* v. *Times Printing Co.*, 158 Wash. 95, 290 Pac. 691; *Hampton* v. *Macon News Printing Co.*, 64 Ga. App. 150, 12 S. E. (2d) 425. Compare, also, in the general field of direct sales: *Matter of Electrolux Corp.*, 288 N. Y. 440, 43 N. E. (2d) 480 with *Electrolux Corp.* v. *Danaher*, 128 Conn. 342, 23 A. (2d) 135 (sellers of vacuum cleaners); *Schomp* v. *Fuller Brush Co.*, 124 N. J. L. 487, 12 A. (2d) 702, aff'd 126 N. J. L. 368, 19 A. (2d) 780, with *Fuller Brush Co.* v. *Industrial Commission*, 104 P. (2d) 201 (Utah, 1940) (sellers of brushes); *Creameries of America* v. *Industrial Commission*, 98 Utah 571, 102 Pac. (2d) 300, with *Mountain Meadow Creameries* v. *Industrial Accident Commission*, 25 Cal. App. (2d) 123, 76 P. (2d) 724 (sellers of dairy products); *In re Foy*, 116 P. (2d) 545 (Wash.), with *In re Levine*, 283 N. Y. 577, 27 N. E. (2d) 439 (distributors of cooking utensils); *Globe, Grain and Milling Co.* v. *Industrial Commission*, 98 Utah 36, 91 P. (2d) 512, modified on rehearing, 98 Utah 48, 97 P. (2d) 582, with *Moorman Mfg. Co.* v. *Unemployment Compensation Commission*, 296 N. W. 791 (Iowa 1941) (sellers of feed); *In re Fidel Ass'n*, 287 N. Y. 626, 39 N. E. (2d) 265 (N. Y. Ct. of App. 1941), with *Robert C. Buell & Co.* v. *Danaher*, 127 Conn. 606, 18 A. (2d) 697 (sellers of securities). See also Wolfe, *Determination of Employer-Employee Rela-*

operation of the Act and was plainly intended by Congress. Indeed, the rule is well settled, and has been recently restated by this Court, that in a federal statute of general uniform application (see Section 10 (a) of the Act) local law must be rejected in favor of the definitions and concepts expressed or implied in the statute itself. *Jerome* v. *United States,* 318 U. S. 101, 104; *Estate of Rogers* v. *Helvering,* No. 66, this Term.[40]

In *National Labor Relations Board* v. *Blount,* 131 F. (2d) 585 (C. C. A. 8), certiorari denied 318 U. S. 791, it was contended both that Section 2 (3) of the Act was to be read in the light of the common law, and that certain Missouri statutes governed the nature of the relationship in issue which the Board had found to be one of employer and employee. Although the miners involved in that case were entirely free from control in the common-law sense, the court

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tionships in Social Legislation, 41 Col. Law Rev. 1015, 1033–1034; *Issues Involved in Determining Eligibility Under the Old Age and Survivors Insurance Program*, Social Security Yearbook, 1941, pp. 47–51; *Some Aspects of Coverage Under Insurance Provisions of the Social Security Program*, Social Security Yearbook, 1940, pp. 74–75.

[40] Accord: *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78; *Lyeth* v. *Hoey*, 305 U. S. 188; *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1; *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499. See also the concurring opinion in *D'Oench Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U. S. 447, 471–472.

upheld the Board's finding that they were employees within the meaning of the Act's distinctive standards. The court stated (131 F. (2d) at 590):

> The respondents contend in effect that the term "employee" used in the Act should be deemed a word of art taken from the common law and should be given the same meaning as servant in the common law decisions relating to master and servant. Many tort and compensation cases are cited, Missouri having contributed its full share to their great volume. It is contended for the Board that its jurisdiction must be measured by the policy and provisions of the Labor Relations Act and already the list of the Board's decisions in the matter fills two closely printed pages.
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> In the abstract there can be no doubt that the federal Act establishes a general and uniform jurisdiction over labor relations in the Board which may not be varied or denied by state statutes or decisions, but the question whether persons are or are not employees must always depend upon the particular facts as they are related to the inquiry in which the question is raised. * * * if the action had been at common law for damages resulting from failure of a master to perform some duty owed to a servant, doubtless other considerations would have been deemed relevant.

Although the *Blount* case, which was cited to the court below, is the only case in the federal courts

which deals directly with and construes the term "employee" in the Act, it was ignored by the court. Instead the court relied heavily upon "the leading case in California," *New York Indemnity Co.* v. *Industrial Accident Commission,* 213 Cal. 43, 1 P. (2d) 12. The court's reliance upon this case illustrates both the uncertainty which will result if federal labor law is made to depend on what the various states hold from time to time and the inconclusiveness of the factors deemed controlling under the common law and other statutes to the issues arising under the National Labor Relations Act. Thus, in the *New York Indemnity* case the California Supreme Court on rehearing, reversing an earlier decision (294 Pac. 707), set aside a workman's compensation award involving a newsboy of the type here in issue on the ground that newsboys were "irresponsible persons" for whose accidents the publisher could not reasonably be held accountable. The record here strongly refutes any suggestion that control over individuals of the type reached by the Board's decision is impossible or even difficult. Moreover, whether or not an employer is in a position to impose such safety controls upon his personnel as to avoid liability under workmen's compensation laws is irrelevant to the issue whether they should be permitted to bargain. Similarly, whatever relevance is present for other purposes in the assertion by the California court, if true, that newsboys are subject

to "physical infirmities" and are "failures in other vocations," this surely is not inconsistent with the bargaining relationship and does not prove that the newsboys are independent merchants (see, *infra*, p. 48). If anything, it emphasizes a need for bargaining.

We believe that the foregoing demonstrates that the common law master-and-servant relationship was improperly adopted by the court below as the test of the employment status under the Act, and that the Act itself furnishes a guide for the ascertainment of the nature of that relationship.

II

The Board's Determination of the Existence of an Employment Relationship, if Supported by the Evidence, is Conclusive

The court below made its own independent determination as to whether newsboys are "employees" within the meaning of the National Labor Relations Act. The opinion makes it clear that no weight whatever was given the Board's administrative judgment that newsboys are "employees." Instead the court proceeded upon the assumption that whether or not the newsboys are "employees" was wholly a matter of law, for the *de novo* decision of the court (R. 1849–1850).[41]

[41] Judge Denman dissented from the opinion of the majority on the sole ground that the court had improperly substituted its own inferences for the Board's (R. 1851, 1852).

And the law applied by the court was the common law of master and servant, with particular reference to the law of California (R. 1848–1851).

Having shown that the Act does not adopt a common law test of master and servant (Point I, *supra*), we urge, first, that the question of coverage was for the determination of the Board (Point II), and that the court below should have upheld the Board's determination since it was not arbitrary and was supported by substantial evidence (Point III, *infra*). In the second place, even if the issue be viewed as one for the courts independently of the Board, we urge that the court below erred as a matter of law in ruling that the newsboys are not "employees" within the meaning of the Act (Point III and IV, *infra*). Even on this view of the role of the courts, the judgment of the Board is entitled to weight.[42]

The court below justified the substitution of its judgment for that of the Board with respect to the ultimate finding of an employment rela-

[42] Contrary to the view of the court below (R. 1848), *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, does not hold that the administrative interpretation of a statute is without weight. The Court there was concerned with the ascertainment of legislative intent with respect to a broad subject matter which was not within the expert competence of a single administrative agency but, rather, covered an area occupied by two administrative agencies. Definition of the boundary between the two agencies clearly involved, as the Court noted, a judicial function. Even with respect to such an issue, which is plainly outside of the

tionship upon the ground that the interpretation of the statute was involved. But the case does not present an unmixed question of law any more than did *Gray* v. *Powell*, 314 U. S. 402; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, or *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 400.

The issue in *Gray* v. *Powell* was whether on undisputed facts a railway company was a "producer" of coal within the meaning of the Bituminuous Coal Act; in the *Shields* case, whether a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act; and in the *Rochester Telephone* case whether one company was under the "control" of another within the meaning of the Communications Act. In each of the cases cited, this Court recognized that the question as to whether particular facts brought a person within statutory language was a matter of judgment on which the decision of the administrative official was to

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principle contended for, the Court noted that the statutory interpretations of the administrative bodies involved "are entitled to great weight" (310 U. S. at 549). As to the weight to be accorded administrative interpretation of a statute, see also *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 580.

be accepted, if supported by evidence in the record, and that such questions of administrative judgment were not to be treated as pure matters of law for purposes of judicial review.

Very recently, in *Dobson* v. *Commissioner,* No. 44, this Term, decided December 20, 1943, this Court epitomized the doctrine of these cases as a recognition that questions of the type under consideration presented "mixed questions of law and fact," and that "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision" of the administrative body must stand. The court also stated that "In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter."

This does not mean that the conclusions of an administrative body are final either on a "fact" or a "law" question. The determination of the administrative body must have "warrant in the record" (*Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146) and a reasonable basis in the law. Just as an administrative decision which is unsupported by substantial evidence has no rational basis in fact, so, too, an administrative ruling which is plainly unreasonable in the light of express statutory language or other convincing evidence of legislative intention has no

foundation in law.[43] For either vice administrative action may be set aside. But "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

We believe that the scope of review which the Court held applicable in *Gray* v. *Powell* to the administrative determination that the railway was a "producer" under the Bituminous Coal Act of 1937 is a proper one here. With respect to that determination the Court said that "the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner" (314 U. S. at 411). If there has been a "sensible exercise of judgment," the administrative decision must be left undisturbed. (*Id.,* at 413.)

Whether a person is an "employee" presents the same type of issue. That the action of the court below in treating the issue as one of law

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[43] Thus, if the language of the statute or its legislative history manifests a specific legislative intention as applied to a particular state of facts, it would be arbitrary for an administrative body to give the statute a different meaning. But if legislative intention appears only in broad outline, without reference to a specific state of facts, there would be legitimate room for administrative discretion in determining whether the Act applied in a particular situation.

without regard to the findings of the Board is in conflict with the principles underlying *Gray* v. *Powell*, is strongly indicated by the decision of the Circuit Court of Appeals for the Second Circuit in *Walker* v. *Altmeyer*, 137 F. (2d) 531. In that case the question was whether Walker was "an employee" within the meaning of Section 209 (b) of the Social Security Act, as amended August 10, 1939 (53 Stat. 1373, 42 U. S. C. sec. 409 (b))." The Social Security Board held that he was, but its decision was set aside by the district court, which drew its own inference from the facts instead of accepting that of the Board. The Circuit Court of Appeals for the Second Circuit reversed, stating (137 F. (2d) at 533–534):

> It was the judgment of the administrative body as to an employer-employee relation-

" Walker had been paid old-age benefits for a period during which he had failed to report that he had received over $15.00 per month from other sources. Under Section 203 (d) (1) (42 U. S. C., sec. 403 (d) (1)) the Social Security Board is required to deduct from future benefits any amounts paid during months in which an individual "rendered services for *wages* of not less than fifteen dollars." Section 209 (a) (42 U. S. C., sec. 409 (a)) defines "wages" as meaning "all remuneration for *employment*," and Section 209 (b) defines "employment" as meaning "any service performed * * * by an employee for the person employing him." Thus if an individual does not receive compensation as an employee, the deduction cannot properly be made. The Social Security Board held that Walker, a lawyer, had been an employee during a period in which he had received over $15.00 per month, and that a deduction should accordingly be made from future benefit payments due him. Walker attacked this decision on the ground that he was not an employee but an independent contractor.

> ship rather than that of the court which the statute made effective provided that judgment was based upon conclusions reasonably reached upon due consideration of all relevant issues presented after parties in interest had been given a fair hearing or a fair opportunity to be heard upon the facts and the applicable law. *Gray* v. *Powell*, 314 U. S. 402.

Both the *Walker* case and the case at bar involved statutory provisions applicable only to "employees"; the board involved in each case was authorized generally to determine whether particular conduct came within the statute, although neither statute contained a specific clause authorizing the administrative agency to pass upon the existence of the employment relationship.[45] Each statute provided that the administrative findings of fact, if supported by substantial evidence, should be conclusive.[46]

A Board finding as to the existence of an employment relationship is entitled to as much weight as its finding as to other essential ingredients of an unfair labor practice. Courts reviewing decisions of the Board involving interpretations of other terms in the statute have never assumed that they could independently judge whether the application made by the Board

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[45] National Labor Relations Act, sec. 10; Social Security Act, sec. 205 (42 U. S. C., sec. 405 (b)).

[46] National Labor Relations Act, sec. 10 (e); Social Security Act, sec. 205 (g) (42 U. S. C., sec. 405 (g)).

was proper. Thus, courts have enforced Board orders resting upon the Board's interpretations of the meaning of the term "labor organization" in Section 2 (5)[47] or "labor dispute" in Section 2 (9)[48] or "concerted activities" in Section 7[49] without exposing them to a special type of judicial scrutiny. Yet these questions are no more "legal" in quality than the finding of employment.[50] Likewise, Board determinations that an individual is an employer either because of his factual relationship to the subject matter of collective bargaining,[51] or because of his control over

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[47] *National Labor Relations Board* v. *J. Freezer & Son*, 95 F. (2d) 840 (C. C. A. 4); *National Labor Relations Board* v. *Nelson Mfg. Co.*, 120 F. (2d) 444, 445 (C. C. A. 8); *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263, 267 (C. C. A. 3).

[48] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. (2d) 144, 148 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *Good Coal Co.*, 110 F. (2d) 501, 503 (C. C. A. 6), certiorari denied, 310 U. S. 630.

[49] *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. (2d) 503, 506 (C. C. A. 2); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585 (C. C. A. 9); *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 937 (C. C. A. 1).

[50] Cf. *South* v. *Railroad Retirement Board*, 131 F. (2d) 748 (C. C. A. 5), certiorari denied, 317 U. S. 701; *Holloway* v. *Railroad Retirement Board*, 44 F. Supp. 59 (N. D. Ga.).

[51] E. g., *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 263; *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567, 569 (C. C. A. 7); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8).

labor relations[52] or because he has acted in the interest of an employer[53] within the meaning of Section 2 (2), have been uniformly upheld without any suggestion that the Board's findings may be disregarded by the courts. Indeed, the Circuit Court of Appeals for the Third Circuit[54] has expressly held that a finding that one is an employer, "is a finding which, like other findings of fact, is for the Board to make and for us merely to review from the standpoint of supporting substantial evidence."[55]

Even to a greater extent than in the *Gray* case, "such a determination as is here involved belongs

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[52] *Butler Bros.* v. *National Labor Relations Board*, 134 F. (2d) 981 (C. C. A. 7), certiorari denied, No. 274, this Term; *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 71 (C. C. A. 3); *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368, 378 (C. C. A. 9); *National Labor Relations Board* v. *Gerity Whitaker Co.*, 137 F. (2d) 198 (C. C. A. 6), certiorari denied, 318 U. S. 763, 801, enforcing 33 N. L. R. B. 393; *National Labor Relations Board* v. *Long Lake Lumber Co.*, 138 F. (2d) 363 (C. C. A. 9).

[53] *National Labor Relations Board* v. *Taylor-Colquitt Co.*, decided November 8, 1943 (C. C. A. 4), 13 L. R. R. 394; *Butler Bros.* v. *National Labor Relations Board*, *supra*, note 52.

[54] *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 71–72 (C. C. A. 3).

[55] Compare *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2), pending on certiorari, No. 265, this Term, where the court adverted to "the doctrine, often stated by the Supreme Court in varying terms, that administrative agencies, because they have been designated by Congress as specialists in a particular field advised by experts, are, within a very wide area, in a better

to the usual administrative routine" (314 U. S. at 411). The employment relationship is the exclusive subject matter of the Act and of the Board's activities. There can be no official Board action, either in an unfair labor practice case under Section 10 or in a representation case under Section 9, unless the employment relationship is present. By failing to specify the precise limits of the broad employment concept contained in the Act (Section 2 (3), "The term employee shall include any employee * * *."), Congress entrusted to the expert judgment of the Board the appropriate application of this definition. It cannot be argued that Congress intended to confide to the specialized skill of the Board findings of fact typically arising from the employment relationship but at the same time to ignore its expert character in determining the existence of such relationship.

The collective bargaining purpose shapes the employment relationship under the Act. Three fundamental considerations determine the existence of such a relationship in a specific case. First, since we are dealing with workers, an inquiry must in every instance be made into whether the individual whose status we are seeking to determine is engaged in a service relationship.[38]

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position than a reviewing court to determine the appropriate applications of the statutes which they are directed to administer."

[38] See Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Col. Law. Rev. 1015, 1034.

The focal question is whether the individual involved supplies his labor or skill in the business of another. Second, the fact that are relationship contemplated by the Act is a collective bargaining relationship narrows the inquiry. The relationship must conform to the bargaining postulates and fit into the framework of the Act. Thus, because supervisors are identified with management, they are not accorded bargaining rights under Section 9 of the Act.[57] *Matter of Maryland Dry Dock Co.*, 49 N. L. R. B. 733. Since there can be no collective bargaining relationship unless a subject for bargaining exists, the relationship must envisage the day-to-day rendition of service in the normal course of a business, for it is this type of service which generates problems which are the normal subject of collective bargaining such as compensation, hours, and working conditions. Control, direct or indirect, exclusive or shared, over these terms of the relationship, identifies the employer for bargaining purposes.[58] Third, since

[57] They are, of course, common law employees and, indeed, employees for purposes of protecting their concerted activities against unfair labor practices. *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678 (C. C. A. 8); *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667 (C. C. A. 8). The dual nature of the supervisor under the Act as both employer and employee emphasizes the inconclusiveness of common law guides and the importance of giving full effect to the language and context of the Act in defining the relationship with which it deals.

[58] See cases cited, *supra* notes 51–53.

we are concerned with *collective* bargaining, more than one worker must be involved (*Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 193),[59] and the objective conditions which characterize the work must normally give rise to the method of group, rather than individual, bargaining and, in normal times to the bargaining sanction of the strike.

These principles are exemplified in a long series of Board decisions.[60] The Board's determinations

[59] See *Matter of Schick Dry Shaver Co.*, 4 N. L. R. B. 246, 252; *Matter of Metro-Goldwyn-Mayer Studios*, 8 N. L. R. B. 858, 864; *Matter of Joseph C. Finch & Co.*, 10 N. L. R. B. 896, 899, 900; *Matter of Trawler Maris Stella, Inc.*, 12 N. L. R. B. 415, 426; *Matter of Paramount Pictures, Inc.*, 13 N. L. R. B. 846; *Matter of RKO Radio Pictures, Inc.*, 13 N. L. R. B. 876; *Matter of Western Union Telegraph Co.*, 35 N. L. R. B. 251; *Matter of Rosenhirsch Co.*, 38 N. L. R. B. 619.

[60] For example: *Matter of Metro-Goldwyn-Mayer Studios*, 7 N. L. R. B. 662, 686–690 (professional writers working exclusively for one company); *Matter of Seattle Post-Intelligencer*, 9 N. L. R. B. 1262, 1270–1275 (newspaper distributors exclusively for one company, who own their own truck and hire their own assistants); *Matter of KMOX Broadcasting Station*, 10 N. L. R. B. 479 (free-lance announcers and radio artists); *Matter of Connor Lumber and Land Co.*, 11 N. L. R. B. 776 (lumber workers under sole direction of contractor but work on company premises, work functionally coherent with company's business and subject to conditions established by company); *Matter of Interstate Granite Corp.*, 11 N. L. R. B. 1046 (colorable lease of a department of an enterprise); *Matter of Trawler Maris Stella, Inc.*, 12 N. L. R. B. 415 (fishermen paid in proportion to selling price of catch); *Matter of American Scale Co.*, 19 N. L. R. B. 124 (colorable lease); *Matter of Sun Life Insurance Co.*, 15 N. L. R. B. 817 (insurance canvassers); *Matter of Park*

with respect to the employment relationship bring within the area of the Act's coverage all workers or wage earners whose livelihood depends upon a continuing association with an enterprise. It is clear also that the operative consideration in every instance is the factual character of the relationship and not surface arrangements of lessor-lessee, vender-vendee, or independent contract through which the work is distributed or compensated for.

Floral Co., 19 N. L. R. B. 403 (colorable lease of greenhouses; work of growers a stage in and integral part of company's entire business; leases involved not so much the accomplishment of any specified result as a continuing operation in close association with whole of company's enterprise); *Matter of Edward F. Reichelt, et al.*, 21 N. L. R. B. 262 (colorable lease of fur business); *Matter of Kelly Co.*, 34 N. L. R. B. 325 (two truck owners working exclusively for company held employees, three working for others as well held independent contractors); *Matter of Post-Standard Co.*, 34 N. L. R. B. 226 (newspaper distributors, despite method of payment, functionally related to company's business); *Matter of Twentieth Century-Fox*, 32 N. L. R. B. 717 (artists working on premises exclusively for one company held employees; free-lance artists working for various companies held not employees); *Matter of James E. Stark Co.*, 33 N. L. R. B. 1076 (lumber crew working under contractor at hours and wages fixed by company); *Matter of Deep River Timber Co.*, 37 N. L. R. B. 210 (those working under contractors preparing roadways and hauling logs employees of company in view of interrelation of all operations at logging camp, assumption by company of responsibility for wage payments of both contractors, and past bargaining history); *Matter of John Yasek*, 37 N. L. R. B. 156 (truck owners hauling logs principally for one company); *Matter of Harry Murphy*, 37 N. L. R. B. 487 (owners of single trucks hauling logs, compensated at footage rate; no finding as to owners of more than one truck, since evidence unavailable as to whether

Similarly, coverage is uniformly denied where the individual involved is engaged in his own business, or, in a self-employed capacity holds himself out to the public or a limited portion of it.

The Board has thus summarized in the present case (R. 108, n. 33) its interpretations of the Act's employment definition:

> In cases where the status of an individual was challenged, we have indicated that the statutory definition of the term "employee" embraces all employees in the conventional as well as legal sense, except those by express provision excluded and that the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.

The versatile administrative connotations of and refinements in the term "employee" which the Board has developed in connection with Section 9 emphasize the fact that this is a subject matter peculiarly appropriate to the exercise of administrative discretion. Thus the Board is called upon

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such owners are engaged in independently established businesses of trucking and transfer); *Matter of Phelps Dodge Corp.*, 34 N. L. R. B. 846 ("contractor" unloading ore on an equal share carload basis); *Matter of Veta Mines*, 36 N. L. R. B. 288, 292 (sections of mine unprofitable for normal company operation, worked by "leasers" who hired "partners"; both "leasers" and "partners" employees).

to decide whether those who work for a contractor are the "employees" of the primary employer and are to be grouped with "other" employees of the primary employer for bargaining purposes.[61] It is frequently required to decide whether shared control over labor relations or over the subject matter of collective bargaining requires that the bargaining relationship extend beyond the immediate employment relationship. The Board in many instances groups in an appropriate unit not only employees of companies interrelated through common ownership and management,[62] but also employees of competing companies,[63] and determines that a group of companies or even a group of associations constitutes one "employer" within the meaning of the Act. In shaping an appropriate bargaining unit the Board must determine whether a particular individual is an "employee" or a "supervisor" for purposes of determining whether he should be placed in a bar-

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[61] See *Matter of Union Lumber Co.*, 7 N. L. R. B. 1094; *Matter of Daniel Creek Logging Co.*, 13 N. L. R. B. 184; *Matter of Markham and Callow, Inc.*, 13 N. L. R. B. 963; *Matter of Gordon Hill*, 38 N. L. R. B. 1276.

[62] *E. g.*, National Labor Relations Board v. Lund, 103 F. (2d) 815 (C.C.A. 8), enforcing and remanding, 6 N. L. R. B. 432; Matter of United Press Associations, 3 N. L. R. B. 344, 347; Matter of Art Graven Co., Inc., 7 N. L. R. B. 102, 116.

[63] *E. g.*, *Matter of Shipowners Assn., of the Pacific Coast*, 7 N. L. R. B. 1002, 1014, 1915, 1021–1025, review denied, *sub nom. American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401; *Matter of Stevens Coal Co.*, 19 N. L. R. B. 98; *Matter of Grower-Shipper Vegetable Ass'n of California*, 15 N. L. R. B. 322, enforced in 122 F. (2d) 368 (C. C. A. 9).

gaining unit and whether extra and irregular employees should be granted the same bargaining rights as full-time employees.[64]

The employment concept is treated with a similar flexibility and diversity in the Board's adjudications with respect to eligibility to vote in an election. In dealing with seasonal enterprises the Board frequently selects as the pay-roll date to be used in determining eligibility to vote in an election, one which will insure bargaining rights to those with a sufficiently close relationship to the entire employment situation to give them an interest in the collective bargaining problems of the appropriate unit and in the selection of a bargaining representative for it even though such individuals may not be currently "employed."[65] Similarly it must determine in which situations strikers who have ceased work, and individuals who replace them,[66] are entitled to vote. It often decides that laid-off employees have a sufficient expectancy of return to employment to entitle them to employee status,[67] and that em-

[64] See *Matter of B. Hoberman*, 30 N. L. R. B. 1241; *Matter of Phelps Dodge Corp.*, 34 N. L. R. B. 846.

[65] *E. g.*, *Matter of American Steamship Co.*, 27 N. L. R. B. 584; *Matter of Ohio Match Co.*, 28 N. L. R. B. 433; *Matter of Hueneme Wharf & Warehouse Co.*, 39 N. L. R. B. 636.

[66] *E. g.*, *Matter of Standard Lime & Stone Co.*, 17 N. L. R. B. 147, 153; *Matter of Rudolph Wurlitzer Co.*, 32 N. L. R. B. 163; *Matter of Thorrez & Maes Mfg. Co.*, 39 N. L. R. B. 693.

[67] *E. g.*, *Matter of Danahy Packing Co., Inc.*, 3 N. L. R. B. 354, 358; *Matter of Paraffine Companies, Inc.*, 25 N. L. R. B. 752; *Matter of Sullivan Machinery Co.*, 31 N. L. R. B. 749.

ployees claimed to be discriminatorily discharged may vote.[68] Decisions according bargaining rights to sick or injured employees,[69] those on leave,[70] and those inducted into the armed services,[71] further illustrate the distinctive nature of the Act's employment concept. Other groups of individuals whose claims to bargaining rights the Board must adjust in terms of the policies of the Act and to whom the Board under certain circumstances awards "employee" status are temporary employees,[72] relief employees,[73] part-time

[68] *E. g., Matter of Lenox Shoe Co., Inc.*, 4 N. L. R. B. 372, 389; *Matter of Federated Fishing Boats of New England & New York, Inc.*, 15 N. L. R. B. 1080, 1091; *Matter of Mine "B" Coal Co.*, 29 N. L. R. B. 405.

[69] *E. g., Matter of Great Lakes Engineering Works*, 3 N. L. R. B. 825, 832; *Matter of American Cyanamid & Chemical Corp.*, 11 N. L. R. B. 803; *Matter of Armour & Co.*, 36 N. L. R. B. 306; *Matter of Wilson & Co.*, 14 N. L. R. B. 283.

[70] *E. g., Matter of Pennsylvania Shipping Co.*, 10 N. L. R. B. 1380; *Matter of Farr Spinning & Operating Co., Inc.*, 29 N. L. R. B. 726.

[71] *E. g., Matter of Marcalus Mfg. Co. Inc.*, 33 N. L. R. B. 107; *Matter of Volney Felt Mills, Inc.*, 36 N. L. R. B. 839; *Matter of Wilson & Co.*, 37 N. L. R. B. 944; *Matter of Rudolph Wurlitzer Co.*, 41 N. L. R. B. 1074.

[72] Illustrative of the cases holding such employees eligible to vote are: *Matter of Reading Transportation Co.*, 10 N. L. R. B. 15, 22, 23; *Matter of Union Premier Food Stores, Inc.*, 11 N. L. R. B. 270, 280; *Matter of Schiff Co.*, 36 N. L. R. B. 575.

[73] Illustrative of the cases holding such employees eligible to vote are: *Matter of Continental Mills*, 30 N. L. R. B. 82; *Matter of Youngstown Steel Door Co.*, 31 N. L. R. B. 555; *Matter of International Harvester Co.*, 32 N. L. R. B. 16, 25, 33, 40.

employees,[74] intermittent and casual employers.[75] In addition, the Board must determine whether to grant eligibility to vote to probationary employees [76] and those transferred or assigned to or out of an appropriate bargaining unit.[77] Finally, special administrative problems are created in adjusting bargaining rights for itinerant employees who frequently shift from one employer to another[78] and for those in the maritime industry.[79]

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[74] Illustrative of the cases holding such employees eligible to vote are: *Matter of Union Premier Food Stores, Inc.*, 11 N. L. R. B. 270, 280; *Matter of Covington Weaving Co.*, 31 N. L. R. B. 1145; *Matter of Montgomery Ward & Co., Inc.*, 38 N. L. R. B. 297.

[75] Declared by the Board eligible to vote in the following cases: *Matter of Metro-Goldwyn-Mayer Studios*, 7 N. L. R. B. 662, 699; *Matter of Bisbee Linseed Co.*, 34 N. L. R. B. 272; *Matter of Hoberman*, 30 N. L. R. B. 1241; *Matter of Hawk & Buck Co., Inc.*, 12 N. L. R. B. 230, 234; *Matter of Medford Corp.*, 30 N. L. R. B. 256.

[76] Illustrative of the cases holding such employees eligible to vote are: *Matter of Nineteen Hundred Corp.*, 32 N. L. R. B. 327; *Matter of Rappaport*, 36 N. L. R. B. 484; *Matter of Western Union Telegraph Co.*, 36 N. L. R. B. 1209; *Matter of Electric Auto-Lite Co.*, 40 N. L. R. B. 1345.

[77] *E. g.*, *Matter of New Idea, Inc.*, 25 N. L. R. B. 265; *Matter of Mason Mfg. Co.*, 15 N. L. R. B. 295; *Matter of Western Union Telegraph Co.*, 32 N. L. R. B. 428.

[78] Granted bargaining rights in the following cases: *Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491, 1499; *Matter of Western Fisheries*, 17 N. L. R. B. 364; *Matter of Columbia River Packers Assn.*, 40 N. L. R. B. 246; *Matter of Monon Stone Co.*, 10 N. L. R. B. 64, 73, 74; *Matter of American Fruit Growers, Inc.*, 10 N. L. R. B. 316, 332; *Matter of Donovan Lumber Co.*, 10 N. L. R. B. 634, 650.

[79] *Matter of International Mercantile Marine Co.*, 1

The comprehensive administrative law of employment relationship which has been developed by the Board in representation cases removes any doubt that the question is a distinctive and technical one and that the interpretation and application of the employment relationship are matters of labor relations rather than of abstract statutory construction.

III

The Board's Determination That the Newsboys Involved Herein Are Employees Within the Meaning of the Act Is Supported by Substantial Evidence

The Board's determination (R. 111) that the newsboys involved herein[80] are employees is

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N. L. R. B. 384, 391, 392; *Matter of Standard Oil Co. of New Jersey*, 8 N. L. R. B. 936, 941; *Matter of Mobile Steamship Assn.*, 8 N. L. R. B. 1297, 1319; 9 N. L. R. B. 60, 61, 62.

[80] The Board has not held that all newsboys should be subject to the Act. In *Matter of Houston Chronicle Co.*, 28 N. L. R. B. 1043, decided on the same day as the cases at bar, the Board denied employee status to certain newsboys on the ground, *inter alia*, that the company did not regulate the number of papers to be sold or the place where they were to be sold. The company sold newspapers to anyone who cared to purchase them and retained no contact with or interest in the purchaser after the sale was consummated. The Board was also impressed with the fact that the newsboys sold a variety of other articles and that they joined a union primarily to suppress competition.

grounded in the following intermediate findings (R. 109):

> Through the district managers, who are authorized to act as the publishers' representatives in the circulation and distribution of their newspapers, the Companies hire the newsboys by the allotment of corners and spots, thus providing them with a place to work, furnish company-owned equipment and paraphernalia to facilitate newspaper sales, and require the newsboys' attendance at their post and attention to their work, within customary limits during relatively definite hours. Moreover, the Companies control the number of papers delivered to the newsboys for purposes of sale, limit their earnings by the establishment of a fixed "wholesale" and retail price for the newspaper, afford them a return privilege for unsold papers [with minor exceptions], and supervise the newsboys' selling activities as to such details of performance as the manner of calling, holding, and displaying the newspaper, and place of its sale within the allotted territory. Furthermore, the Companies at will discharge the newsboys, transfer them to other locations, and lay them off as disciplinary measures. The newsboy is not free to sell where he will; he must operate in a certain area under company-imposed restrictions; if he does not succeed in selling, he will be dismissed. Since the relationship contemplates services of an indefinite duration terminable at the will of

> either party, the newsboy has no vested interest in the newspaper business. Although he is not carried on the companies' pay roll, the newsboy is an integral part of the Companies' distribution system and circulation organization.

The Board referred to the test it has repeatedly applied (R. 108, n. 33; *supra*, p. 59), and concluded (R. 111):

> Finally, counsel for the Companies cite California and other local decisions establishing the status of newsboys as independent contractors with respect to the publisher's liability in tort and workmen's compensation proceedings. We do not herein pass upon the nature of the relationship for other purposes, but hold upon this record that the newsboys here involved are within the definition of employees as the term is used in this Act. Accordingly, we find that the newsboys involved in this proceeding are employees within the meaning of Section 2 (3) of the Act.

The facts summarized in the Statement (*supra*, pp. 3–25) amply support the findings and unmistakably bring the newsboys involved herein under the protection of the Act. The distinctive tests, described above (*supra*, pp. 55–67), for determining the existence of the employment relationship under the Act are fully met here. It is plain that the newsboys are involved in a service relationship. They are hired by respondents, are

engaged in the process of earning a living in furtherance of respondents' enterprises, are subject to disciplinary lay-off and discharge by respondents. Moreover, the pattern of their service involves a continuing participation in respondents' newspaper distribution activities which is characterized by fixed hours and by standard compensation rates constituting a payment for manual labor or a wage. The work is not limited in time by the performance of a particular task nor is the compensation for the application of a peculiar skill or the use and operation of special equipment. The individuals whose status is here in issue constitute a labor force performing the same tasks for the same respondents day after day, year after year. Equipped with neither special skill nor capital, the newsboys' bargaining position with respect to the problems of wages, hours, and working conditions which their work, by its very nature, generates, is glaringly unequal to that of the publishers. Section 1 of the Act.

Finally, the objective conditions which characterize the work of the newsboys as employment within the meaning of the Act are reflected in the conduct of the newsboys and respondents. The newsboys formed a labor organization which is chartered by, and affiliated with one of the recognized national labor groups.[51] Instead of attempt-

[51] Newsboys constitute a substantial occupational group (McDaniel, H. B., *The American Newsboy* (1941), p. 17)

ing to enter into individual contracts with respondents, they have sought to invoke the process of collective bargaining concerning their wages and working conditions. Respondents have, in fact, dealt with them collectively in the adjustment of grievances relating to these matters (R. 554, 664–668, 674–677, 873–874, 1085–1086). And in the elections conducted by the Board the majority of each of respondent's newsboys voted to have the Union act as their collective bargaining representative (R. 187–197, 237–240).

The court below not only improperly substituted a common-law standard for the statutory standard but it also independently reviewed the facts to find that the newsboys were merchants and were not engaged in a service relationship (R. 1850–1851). Such a view is untenable. Merchants are not hired and assigned a geographic

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and have been organized into more than 40 labor unions, affiliated with either the American Federation of Labor or the Congress of Industrial Organizations. Most of the unions in the field have been chartered by the International Printing Pressmen's and Assistants' Union of North America, A. F. of L. See the *Official Directory* (July 1942), and the *Service Bureau News Bulletin* (December 1942), of the Pressmen's Union and *Monthly Labor Review*, Vol. XXII, No. 2. The latter source contains an agreement covering terms and conditions of employment between a newsboys' union and a publisher.

A number of strikes have occurred among newsboys throughout the country and some of them have been broken through the use of unusual violence and intimidation. See Lundberg, F., *Imperial Hearst* (Modern Lib. Ed., 1937), pp. 161, 195, 300.

location by their suppliers;[22] they are not subject to elaborate controls with respect to the time during which they are to sell and promptly refused merchandise because the hours of sale and diligence used in selling displease the wholesaler (*supra*, pp. 15–21). Merchants are not normally classified into such categories as "full time," "temporary," "casual" and "part time" (*supra*, p. 5), transferred to new selling locations or refused merchandise altogether because the consumer complains of their conduct to the wholesaler (*supra*, pp. 15–16). A wholesaler does not threaten to refuse to deal with a merchant because he closes his establishment during the lunch hour (R. 728), and does not refuse to permit an authorized agent of the merchant to accept delivery of merchandise (R. 719–720). Merchants in short are not engaged in a personal relationship. Merchants normally risk capital and enjoy an opportunity for profit; such is not the case here.[23]

Contrary to the view of the court below, the fact that newsboys sell other publications does not, un-

[22] The court below (R. 1851) attributed the fact that each newsboy has an exclusive sales territory to "a tacit understanding between them." This is a serious misreading of the record (*supra*, p. 14).

[23] The statement of the court below (R. 1850) that the "extension of credit" to the newsboy is an evidence of his independent status is difficult to accept. The fact that the newsboy is not required to pay for his papers until he sells them is hardly such an "extension of credit" as to clothe him

der the circumstances of this case and for purposes of the Act, convert them into merchants. Newsboys are not free to purchase competing publications from other publishers. Indeed, they have even been forbidden to sell such publications and normally do so only in accordance with arrangements created by the publishers (*supra*, p. 24). It is plain that the facts relating to this practice presented by this case do not refute employment; they merely describe an aspect of the employment situation which is a subject for collective bargaining.[84]

The "purchase" by newsboys of corners in the public domain from those previously occupied in selling there—a practice which appears to be limited to Herald newsboys and to a few corners (R.

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with merchant status. If it were otherwise, route salesmen, waiters, account collectors, vacuum-cleaner and brush salesmen (see *infra*, pp. 80–81) would all be elevated to the role of businessmen. The only inference that may legitimately be drawn from the fact that the newsboy automatically "pays" for his papers at the end of the day by retaining a sum of money is that the newsboy is not required to risk his "capital," the absence of which is a conventional criterion of employment, and one which is strongly emphasized here by the fact that the newsboy is normally not charged for the papers which he does not sell.

[84] Plural employment is not uncommon in American industry, particularly on the railroads. See the Railroad Retirement Act of 1937, 45 U. S. C., sec. 228 (a) (b); Carriers Taxing Act of 1937, 45 U. S. C., secs. 261 (1) and 263. Compare the Referee's Opinion in *Order of Railroad Telegraphers* v. *Railway Express Agency*, No. 343, this Term, Record, pp. 236–238.

736, 922–923, 930–931, 939, 944–945)[85]—is not an index of merchant status. The newsboys buy nothing but the right to present themselves for employment; the publisher is not bound by the "sale," and is free to make his own arrangements (R. 953–957, 1044–1045, 1006–1007).[86] Nor does such "purchase" free the newsboy from the intimate control over his activities to which he would be subjected were he hired directly (see for example, R. 728–731, 736, 918). This is an instance of the familiar industrial abuse of job selling,[87] which has never been regarded as an obstacle to the establishment of an employment relationship. In fact, it emphasizes the need for regularizing hiring practices, a traditional subject of collective

[85] The wealth of evidence in the record regarding the publishers' practice of hiring and assigning newsboys to corners (*supra*, p. 14) plainly shows that such "sales" do not normally initiate the relationship.

[86] To the effect that the publisher's permission is normally required and sought before a corner is transferred see R. 942, 957, 1056, 924–925, 1007.

[87] Bulletin of the Industrial Commission of Ohio, Division of Investigation and Statistics, Report No. 24 (1916), *Job Selling in Industrial Establishments in Ohio;* Industrial Service Bureau, Bulletin No. 1 (1918), *Hiring and Firing Suggestions for Employers*, p. 5; Hamilton, W. I., *Employer-Employee Relations in Hotels* (1925), pp. 17–18; U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 555 (1932), *Cargo Handling and Longshore Labor Conditions*, p. 72; Statements of Bruce Hannon, Secretary, Maritime Federation of the Pacific, in *Hearings before the Committee on Merchant Marine and Fisheries*, House of Representatives, 76th Cong., 1st Sess., on H. R. 4051, May 10, 19, 22 (1939), pp. 17–19.

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bargaining. Also adverted to by the court below as an indication of merchant status is the fact that a few of the newsboys engage assistants for relief and other purposes (R. 1851). Even if the practice were far more prevalent than the record shows it to be,[88] it would merely duplicate a familiar industrial phenomenon which does not negative the employment relationship.[89] Finally, the fact that the newsboy is not credited in his returns for papers which are accidentally destroyed or stolen (but see R. 1396, 1290) is not as impressive as the court below deemed it to be (R. 1850).[90] Workers frequently are held accountable for losses and spoilage.[91]

The court below on the one hand ascribed unwarranted importance to the "purchase and sale" aspect of the relationship and on the other

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[88] The only references to the practice which occur in the record are: Herald, R. 719, 743, 747, 931–932, 939, 946, 982, 1004, 1336–1337; *Examiner*, R. 1488.

[89] See Ashworth, J. H., *The Helper and American Trade Unions*, Johns Hopkins Studies in Historical and Political Science, Series XXXIII, No 3 (1915), Ch. II, *The Hiring and Compensation of the Helper*, pp. 67–77; Motley, J. M., *Apprenticeship in American Trade Unions*, Johns Hopkins Studies, Series XXV (1907), p. 22; Webb, Beatrice and Sidney, *Industrial Democracy* (1920), p. 459.

[90] Far more impressive is the fact that the newsboys receive full credit for the papers which are *not* stolen or destroyed (*supra*, p. 22).

[91] Dobb, M., *Wages* (1938), pp. 76–77; Webb, Beatrice and Sidney, *Industrial Democracy* (1920), p. 315; Alford, L. P., ed., *Cost and Production Handbook* (1934), p. 108; Hutchins, Grace, *Labor and Silk* (1929), p. 106: Mack, Francis, *Waste Elimination Incentives* (1928), p. 35.

ignored the controls which are intimately involved in the relationship. These elaborate controls are no accident and the Board's finding with respect to them cannot be characterized as "misleading", as asserted by the court below (R. 1851), merely because they are attended by an ambiguous sale.

The work of the newsboys and the complete and constantly exercised controls by respondents over it cannot be explained as a cinematographic series of sales and resales burdened with conditions. The facts in this case demonstrate that the activities of the newsboys involved herein are a necessary part of a unified enterprise devoted to the sale of news to the public. Circulation is the life-blood of a newspaper (cf. *Lovell v. City of Griffin*, 303 U. S. 444) and the newsboys in this case have been integrated by respondents into a complex marketing system which is directed to maintaining and increasing circulation among the members of the public (*supra*, pp. 6–14, see also R. 545, 1151, 1160, 1352, 1593). It is plain that the purpose of this system is not to sell papers to these newsboys [92] but to reach the large numbers of individuals who read the news and advertisements. To view the facts otherwise is to disfigure them. It is because respondents

[92] The practice by newsboys of holding out papers which they did not sell in order to meet a quota and thus to earn a bonus is described at R. 1321–1323. This bonus system which was used by the Times was dropped in 1935 (R. 1321).

have made the newsboy a key figure in their efforts to reach the public in an organized and systematic way that the relationship here presented is one of personal service characterized by close control.[93] Indeed, if the newsboys involved herein are not employees under the Act then it is difficult to see upon what basis individuals engaged in outside selling and distribution activities which involve substantially greater freedom from control than is present here can be held to be in employment. Yet such individuals and others engaged in related activities have frequently been held employes under the common law and other statutes certainly no broader in scope than the Act.[94]

IV

The Newsboys Here Involved Are Employees Under Usually Accepted Common Law Tests

As we have already shown, the applicability of the Act to the newsboys here involved turns upon the statutory language, purpose, and policy. However, even under common law concepts, the newsboys would be regarded as employees.

[93] The closeness of the control exhibited by the relationship in issue, particularly with respect to promptness and diligence, is explained in part by the fact that news is "the world's most perishable commodity" (McDaniel, *op. cit.*, p. 17), "a prior edition after a later edition appears on the street is unsalable" (R. 570). Cf. *International News Service* v. *Associated Press*, 248 U. S. 215, 238.

[94] See n. 8, p. 80, *infra*.

"Whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished," the relation of master and servant exists. *Singer Manufacturing Co.* v. *Rahn,* 132 U. S. 518, 523.[95] We believe that the record establishes the existence and exercise of such a right here. The record shows that the newsboys' work was subject to the supervision not only of checkmen, where they were used (*supra,* p. 7), but of district managers and, in some cases, of "spotters" as well. Indeed, it was the duty and function of the district managers to oversee the activities of the newsboys (*supra,* p. 11). In performance of this duty, district managers direct the newsboy exactly how he shall operate within the territory assigned, where he shall stand, how he shall display his papers in racks, where he shall post advertising placards, and even exactly how he shall hold his papers (supra, pp. 15–21). The record unmistakably shows the control was substantial and that "if instructions were given, they would have to be obeyed." *Press Publishing Co.* v. *Industrial Accident Commission,* 190 Cal. 114, 121, 210 Pac. 820, 823.

[95] Although the court below paid lip service to the fact that it was dealing with legislation "based upon a broad policy of public benefit" (R. 1848), it selected from among conflicting formulations of the common law one which states the test most rigidly: "The control referred to must be complete control of the means and methods of performance" (R. 1849).

The court below, in holding that "the publisher had at best a limited control over the activities of the newsboys" (R. 1850), apparently ignored the fact that the test of control does not require that the work be performed on the employer's premises or under his ever-vigilant eye. The nature of the employee's work "may be such that much or little supervision may be necessary." *Fischer* v. *Industrial Commission*, 301 Ill. 621, 629, 134 N. E. 114, 117. See also *Western Express Co.* v. *Smeltzer*, 88 F. (2d) 94, 97 (C. C. A. 6); *Franklin Coal and Coke Co.* v. *Industrial Commission*, 296 Ill. 329, 129 N. E. 811; *Town of Eagle* v. *Industrial Commission*, 221 Wis. 166, 266 N. W. 274.[96]

The court below not only stated and applied the control test with unwarranted rigidity, but it disregarded collateral tests frequently applied at common law. Certainly, the newsboy cannot be said to be engaged in a distinct occupation or calling[97] in furtherance of which he is engaged for a specific job or piece of work. Vending news-

[96] In concluding that a timber sawyer who had agreed to cut logs at a specified "piece rate" was an employee, the Wisconsin Supreme Court in *Allaby* v. *Industrial Commission*, 200 Wis. 611, 614, 229 N. W. 193, 194, said: "What details of any consequence were there left to the exclusive control of Rogers [the employee]? There only remained for him to control the extent and time of the application of his muscular power to the reduction of the designated trees to veneer logs or to ties. * * *"

[97] See Restatement of the Law of Agency, Section 220 (2) (b); Leidy, Paul A., *Salesmen as Independent Contractors*, 28 Mich. Law Rev. 365.

papers does not require any particular skill. While the work is carried on in the public domain, it is respondents who decide where it is to be done, assigning the newsboys to a particular corner and providing him with such tools and instrumentalities as are necessary, such as stands, racks, change aprons, and advertising material (*supra*, p. 23).[26]

Any semblance of independence in the newsboys is dispelled by respondents' ability to discharge them at will.[27] While the court below characterized such dismissals as a refusal "to deliver further merchandise" (R. 1851), they are, realistically viewed, discharges.[1] It could hardly

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[26] Both the assignment of a place to work and the provision of instrumentalities for work are evidences of common law employment. Restatement of the Law of Agency, Section 220 (2) (e).

[27] An important index of common law employment. E. g., *Jack & Jill, Inc.* v. *Tone*, 126 Conn. 114, 9 A. (2d) 497; *Aisenberg* v. *C. F. Adams Co., Inc.*, 95 Conn. 419, 111 A. 591; *Robert C. Buell & Co.* v. *Danaher*, 127 Conn. 606, 18 A. (2d) 697; *Industrial Commission* v. *Bonfils*, 78 Colo. 306, 241 Pac. 735.

[1] See *Schomp* v. *Fuller Brush Co.*, 124 N. J. L. 487, 490–491, 12 A. (2d) 702, 704, when the court in holding that an outside salesman was an employee and not an independent contractor, stated: "* * * he must sell a given amount of merchandise or he will be dismissed. True, it is a subtle dismissal in this that the 'dealer' will be advised by a manager, as it appears in the depositions, that he 'isn't fitted for this work and he would be better off to find something else,' etc.; that he would be advised to 'turn in your case' and this,

be argued that the newsboy could continue "in business" on the public sidewalk and sell merchandise other than newspapers (cf. *Wilson* v. *McGill*, 42 D. & C. (Pa.) 74) or that the publisher would not, and does not, promptly assign a replacement to "cover" the corner.

Nor are the newsboys endowed with independence under the common law tests, as usually applied, because they are not paid fixed wages,[2] or because they sell other publications.[3] And those few newsboys who have "purchased" cor-

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if the dealer did not comply, would be followed by what is called a 'termination notice' which meant that no merchandise would, after a given date, be shipped to the 'dealer' who does not accomplish the company's unstated minimum of sales. This, we think, is complete control in fact—even if by the mechanics of written contract it seems remote."

[2] The master and servant relationship may exist although the servant neither expects nor is entitled to compensation. *Southern Railway Co.* v. *Black*, 127 F. (2d) 280, 282 (C. C. A. 4). See also *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518; *Fleming* v. *Palmer*, 123 F. (2d) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Hillen* v. *Industrial Accident Commission*, 199 Cal. 577, 581, 250 Pac. 570; remuneration of a common law employee may consist of the difference between the price he pays his employer for goods and the price at which he sells them. Cf. *State Compensation Fund* v. *Industrial Accident Commission*, 95 Colo. 309, 35 P. (2d) 849, the *Sisk* case cited n. 3, *infra*; *In re Scatola*, 282 N. Y. 689, 26 N. E. (2d) 815.

[3] See *Press Publishing Co.* v. *Industrial Accident Commission*, 190 Cal. 114, 210 Pac. 820; *Shields* v. *William Freihofer Baking Co.*, 147 Pa. Super. 455, 24 A. (2d) 54; *Sisk et al.* v. *Arizona Ice and Cold Storage Co.*, 141 P. (2d) 395 (Ariz.).

ners[4] or engaged assistants[5] would not for such reasons be denied common law employee status. Finally, neither the fact that a Herald newsboy may also work for the News[6] or the fact that the work is formally distributed and compensated for through a purchase-and-sale arrangement[7] can be regarded as inconsistent with an employment relationship measured by common law standards.

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[4] Cf. *Boehm* v. *Spreckels*, 183 Cal. 239, 191 Pac. 5 (purchaser of newspaper route acquires only an opportunity to offer himself to publisher as a substitute for vendor). To the extent that it be urged that the "purchase" of a corner in the public domain constitutes a financial investment in an enterprise, clothing the "purchaser" with the status of an enterpreneur, it need only be noted that more substantial contributions have been held not to negative employment. *Grand Rapids Gravel Co.* v. *United States* (W. D. Mich.), decided March 30, 1943, Commerce Clearing House, Unemployment Insurance Service, Federal, Par. 9047; *Western Express Co.* v. *Smeltzer*, 88 F. (2d) 94 (C. C. A. 6); *Rozran* v. *Durkin*, 381 Ill. 97, 45 N. E. (2d) 180 (driver using own truck and paying own operating expenses).

[5] *Gulf Refining Co.* v. *Brown*, 93 F. (2d) 870, 873 (C. C. A. 4); *Hillen* v. *Industrial Accident Commission*, 199 Cal. 577, 250 Pac. 570.

[6] *Taylor* v. *St. Paul's Universalist Church*, 109 Conn. 178, 182, 145 Atl. 887, 889 ("one may hold the legal relation of employee to more than one employer at the same time").

[7] For example, *Salt Lake Tribune Publishing Co.* v. *Industrial Commission*, 99 Utah 259, 102 P. (2d) 307; *Schomp* v. *Fuller Brush Co.*, 124 N. J. L. 487, 12 A. (2d) 702, aff'd, 126 N. J. L. 368, 19 A. (2d) 780; *Creameries of America* v. *Industrial Commission*, 98 Utah 571, 102 P. (2d) 300. See also, Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Col. Law Rev. 1015, 1033–1034.

It is only when an artificial ornamentation of "purchase and sale," "wholesale price" or "retail price" is permitted to obscure the realities of the relationship in issue that it is possible to view the newsboys as merchants. "Rather, it appears, that on the one side there is 'an intimacy of control and on the other a fullness of submission that imports the presence of a sovereign' as a master, we are reminded, was sometime called in the old books."[8]

The newsboys' basic relationship to respondents is, we believe, not distinguishable from other types of outside workers who are engaged in direct selling, transportation, canvassing and solicitation, and related activities. Though many of the individuals engaged in such occupations are permitted considerable more latitude of discretion as to methods and hours of work, they have been held in employment under state unemployment compensation laws and other legislation.[9] No other conclusion seems possible here.

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[8] *In re Morton*, 284 N. Y. 167, 30 N. E. (2d) 369.

[9] Newsboys: *Salt Lake Tribune Publishing Co.* v. *Industrial Commission*, 99 Utah 259, 102 P. (2d) 307; *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 3 Cal. (2d) 759, 47 P. (2d) 270, reversing 38 P. (2d) 809; *In re Scatola*, 282 N. Y. 689, 26 N. E. (2d) 815; *Wilson* v. *Times Printing Co.*, 158 Wash. 95, 290 Pac. 691; *Hampton* v. *Macon News Printing Co.*, 64 Ga. App. 150, 12 S. E. (2d) 425; *Associated Indemnity Corp.* v. *Industrial Accident Commission*, 128 Cal. App. 104, 16 P. (2d) 774; *Globe Indemnity Co.* v. *Industrial Accident Commission*, 208 Cal. 715,

CONCLUSION

The National Labor Relations Act does not echo a common law test of the employment relationship; the overriding purpose and policy of the legislation must be taken into account. These, as well as the language of the Act, furnish the basis for an administrative decision, and in effect set a standard to be applied by the Board in varying situations. The Board's determination of the employment relationship should not be

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284 Pac. 661; *Press Publishing Co.* v. *Industrial Accident Commission*, 190 Cal. 114, 210 Pac. 820.

Route salesmen: *Sisk et al.* v. *Arizona Ice and Cold Storage Co.*, 141 P. (2d) 395 (Ariz.) (ice route driver-salesmen paid difference between wholesale and retail price, hire and pay own assistants, maintain and operate own trucks, advanced credit until end of selling day and not required to pay for unsold ice returned in good condition; drivers fix own hours, sell other items beside ice, and do other work); *Pure Baking Co.* v. *Early* (E. D. Va.), decided March 24, 1943, Commerce Clearing House, Unemployment Insurance Service, Federal, Par. 9062 ("vendees" operating bakery routes); *In re Castaldo*, 263 App. Div. 758, 30 N. Y. S. (2d) 736.

Commission salesmen and distributors: *In re Morton*, 284 N. Y. 167, 30 N. E. (2d) 369; *Jack & Jill, Inc.* v. *Tone*, 126 Conn. 114, 9 A. (2d) 497 ("vendees"); *Creameries of America* v. *Industrial Commission*, 98 Utah 571, 102 P. (2d) 300 ("vendees"); *Singer Sewing Machine Co.* v. *State Unemployment Compensation Commission*, 103 P. (2d) 708 (Ore. 1940); *Matter of Electrolux Corp.*, 288 N. Y. 440, 43 N. E. (2d) 480; *In re Foy*, 116 P. (2d) 545 (Wash.) ("vendees" of utensils); *Robert C. Buell & Co.* v. *Danaher*, 127 Conn. 606, 18 A. (2d) 697; *Stone* v. *United States* (E. D. Pa.), decided September 16, 1943, Commerce Clearing House Unemployment insurance Service, Federal, Par. 9077; *Globe Grain & Milling Co.* v. *Industrial Commission*, 98 Utah 36, 91 P. (2d) 512, modified on rehearing, 98 Utah 48, 97 P. (2d) 582.

reviewed *de novo* by the courts, attempting to apply a "fact"—"law" yardstick, but should be sustained if reasonable and supported by the evidence. The Board's determination that the newsboys here are employees meets these requirements. Indeed, even under a common law test, the newsboys are employees. For these reasons, we respectfully submit that the judgments of the court

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Taxi drivers and truck owner-operators: *Kaus* v. *Unemployment Compensation Commission*, 230 Iowa 860, 299 N. W. 415; *Kaus* v. *Huston*, 35 F. Supp. 327, aff'd. 120 F. (2d) 183 (C. C. A. 8); *Rozran* v. *Durkin*, 381 Ill. 97, 45 N. E. (2d) 180; *Grand Rapids Gravel Co.* v. *United States* (W. D. Mich.), decided March 30, 1943, Commerce Clearance House Unemployment Insurance Service, Federal, Par. 9047; *In re Farwest Taxi Service*, 114 P. (2d) 164 (Wash.).

Insurance agents and canvassers: *Industrial Commission* v. *Northwestern Mutual Life Insurance Co.*, 103 Colo. 550, 88 P. (2d) 560; *Unemployment Compensation Commission* v. *Jefferson Standard Life Insurance Co.*, 215 N. C. 479, 2 S. E. (2d) 584; *In re Mid-America Co.*, 31 F. Supp. 601 (S. D. Ill.); *Unemployment Compensation Commission* v. *Harvey*, 179 Va. 202, 18 S. E. (2d) 390; *Life & Casualty Insurance Co.* v. *Unemployment Compensation Commission* 178 Va. 46, 16 S. E. (2d) 357; *Industrial Commission* v. *Northwestern Mutual Life Insurance Co.*, 103 Colo. 550, 88 P. (2d) 560; *Northern Oil Co.* v. *Industrial Commission*, Commerce Clearing House Unemployment Insurance Service, decided July 28, 1943, Utah, Par. 8068.

See, also, *Issues Involved in Determining Eligibility Under the Old Age and Survivors Insurance Program*, Social Security Yearbook, 1941, pp. 47–51; *Some Aspects of Coverage Under Insurance Provisions of the Social Security Program*, Social Security Yearbook, 1940, pp. 74–75.

below should be reversed and the causes remanded with directions to enforce the Board's orders in full.

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JANUARY 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce * * *
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used is this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service

of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin* such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any per-

* So in original.

son from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such

person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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